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REVIEW OF AIRLINE DEREGULATION AND SUNSET OF THE CIVIL AERONAUTICS BOARD

(Legislative Proposals Relating to Airline Deregulation and CAB Sunset)

(98-42)

HEARINGS

BEFORE THE

SUBCOMMITTEE ON AVIATION

OF THE

COMMITTEE ON
PUBLIC WORKS AND TRANSPORTATION
HOUSE OF REPRESENTATIVES

NINETY-EIGHTH CONGRESS

SECOND SESSION

MARCH 13, 14, 1984

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Committee on Public Works and Transportation

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REVIEW OF AIRLINE DEREGULATION AND SUNSET OF THE CIVIL AERONAUTICS BOARD

(Legislative Proposals Relating to Airline Deregulation and CAB Sunset)

TUESDAY, MARCH 13, 1984

House of Representatives,
Subcommittee on Aviation,
Committee on Public Works and Transportation,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:07 a.m., in room 2167, Rayburn House Office Building, Hon. Norman Y. Mineta (chairman of the subcommittee) presiding.

Mr. Mineta. The subcommittee will please come to order.

Because of a commitment at another subcommittee, I would like to recognize at this time, our colleague—our fine colleague from Georgia—Mr. Levitas.

Mr. Levitas. Thank you very much, Mr. Chairman. I appreciate your indulgence. It is necessary for me to be in another room to preside over hearings of the Investigations and Oversight Committee, scheduled for this morning at this same time. But because of my very great interest in the subject matter of these hearings, I wanted to say at the outset that I feel that decisions are going to have to be made in the next 3 to 6 weeks, about the matters which you will be hearing testimony on today.

Looking at the list of witnesses, I am convinced that this testimony, together with that which we have already received, will provide us with a basis for making a judgment call.

I intend to join in later this day, after our hearings upstairs are completed. But I wanted to commend you and Mr. Hammerschmidt for taking the initiative and not simply ducking this difficult decision that has to be made. And I am satisfied that you will be asking all of the hard questions that need to be asked.

And as so frequently happens, the apparent dispute between two or more agencies of Government are going to come right to this room for resolution. And I will certainly work with you to make that decision. I do not think we can simply let it go by default.

Mr. Mineta. Thank you very much for always being on top of things. I appreciate your comments today.

The purpose of our hearings today and tomorrow is to consider whether legislation is needed to complete the transition to deregulation at the end of this year. And if so, what should be or should not be in that legislation.

Of all of the subjects that might be included in that rather broad purpose, I think three points deserve emphasis at the outset. First and foremost, is consumer protection. The administration advocates no bill. If we were to agree with their position, consumers of air transportation would feel the brunt of the resulting changes on January 1. The Federal Aviation Act contains two sections on which all existing consumer protection regulations for airline passengers are based.

One of them, section 404, would disappear entirely on January 1, if we have no bill. The other section, 411, would disappear as well. However, the Department of Transportation has argued that the Federal Trade Commission authority is similar to section 411. Section 5 of the FTC Act would govern in the place of section 411. The FTC Act, however, contains an express statutory exemption of the airline industry from FTC consumer protection authority. Hence, it is doubtful at best, and highly unlikely in the eyes of most observers, that under the DOT approach, the consumer would, on January 1, continue to have any of the existing consumer protection authorities or regulations.

The question here is, Should those consumer protection authorities be continued by legislation and, if so, to which agencies should they be so assigned?

Second, existing law gives the Civil Aeronautics Board the authority to grant antitrust immunity to intercarrier agreements, where certain transportation policy tests can be met.

Under the operation of existing law, that authority would transfer to the Department of Justice on January 1. The question is whether, because the statutory test to be weighed are tests of transportation policy, that authority should be assigned, in legislation, to the Department of Transportation.

And third, it should be clear to all that certainly after Secretary Dole's testimony 2 weeks ago, that this administration does not particularly want and certainly does not feel it needs sunset related legislation. Any provision which is reregulatory or special interest in nature, or which the administration finds intolerable, will most likely result in a veto for the entire bill.

In other words, the addition of such provisions would not only be self-defeating, but would certainly affect the interest of aviation consumers generally. In that regard, it should be clear that we are not going to reverse the Congress decision, in 1978, to deregulate basic economic decisionmaking in this industry—decisionmaking governing routes, rates, and the allocation of airline resources by their managements.

Nevertheless, we are coming to the end of the transition process to deregulation. And now is our opportunity to make any adjustments in the statutory framework which will govern the deregulated airline industry beginning January 1 and extending into the indefinite future. Our decisions about how such issues, such as consumer protection, antitrust immunity, and carrier fitness determinations, should be treated in a deregulated environment, are decisions that likely are to be in statute and in the traveling experiences of the American public, for many years to come.

At this time, I would like to recognize our very distinguished colleague from Arkansas, Mr. Hammerschmidt.

Mr. HAMMERSCHMIDT. Thank you, Mr. Chairman.

As you have already stated, our hearings today and tomorrow will conclude the subcommittee's hearing schedule on issues relating to CAB sunset and airline deregulation.

As my colleagues are aware, the subcommittee started its inquiry at the beginning of this Congress. It has held numerous hearings since then on many of the major economic issues confronting the aviation industry. During these next 2 days, we will be focusing on the substantive issues which must be resolved if the Congress is going to enact sunset legislation this year.

Among the major issues to be addressed include antitrust immunity, consumer protection, domestic air carrier fitness, labor protection, and other areas as well. Although I will not elaborate on these issues at this time. I do intend to thoroughly review the testimony presented during the next 2 days, as the subcommittee continues its consideration of sunset issues.

I would like to briefly mention one issue which has certainly received more than its share of attention. That is, whether or not we should even enact a sunset bill at all. I think most observers would agree that a so-called clean bill would definitely be in the public interest, since it would clear up some very large ambiguities in existing law.

For example, in the area of consumer protection, it is highly questionable that any Federal agency would have adequate authority to regulate in this area, unless legislation is enacted. While I realize that DOT's lawyers have come up with a rather innovative interpretation which would confer this authority on FTC, even if no bill was passed, I would suggest that it is just as likely that a court would find to the contrary.

If so, existing CAB rules on denied boarding compensation, baggage liability charter rules, and notice for passengers could be voided, resulting in a considerable amount of confusion and inconvenience to the traveling public. Also included in this category is the Board's proposal on computer reservations systems, an area in which this committee has always been actively involved.

Those who have argued that there is no need for a sunset bill have indicated that it will become a Christmas tree, or a vehicle for a host of re-regulation amendments. While, I will not get into the business of predicting what kind of bill this committee or the House might adopt, I believe it would be a serious mistake to decide not to go forward with legislation at this time.

Of course, no one knows what amendments may ultimately be adopted or how an introduced bill might be modified. However, it seems that these considerations exist with virtually any piece of legislation and if there is an acknowledged need for a bill, I think we have an obligation to proceed so that we can attempt to resolve some of these issues before the Board sunsets at the end of this year.

Accordingly, Mr. Chairman, I look forward to the testimony today and wish to thank our witnesses for their assistance to the subcommittee.

Thank you, Mr. Chairman.

Mr. MINETA. Thank you very much, Mr. Hammerschmidt.

Our first witness this morning is the Honorable Jim Burnley, Deputy Secretary of Transportation. Mr. Secretary, we are pleased to have you with us this morning. The full text of your prepared statement will appear in the record at this point.

[Statement referred to follows:]

STATEMENT OF JAMES BURNLEY, DEPUTY SECRETARY OF TRANSPORTATION

Mr. Chairman and members of the subcommittee: I appreciate this opportunity to appear before your subcommittee to detail the Department of Transportation's position on legislative proposals for CAB sunset and related substantive matters.

Secretary Dole appeared before this subcommittee February 29 and advised you of our basic position on CAB sunset legislation: We believe that the provisions of the 1978 Airline Deregulation Act accomplish sunset, and that any additional legislation at this point could become the magnet for diverse amendments by special interests that could confuse or interfere with orderly sunset of the CAB.

Secretary Dole assured you that the Department would judge clarifying legislation on its merits before making a recommendation to the President whether or not he should sign it. One of the primary criteria she will use in reviewing any such legislation is the requirement that it not change the existing jurisdictional arrangement for sunset.

However, the Department continues to believe strongly that additional legislation is not needed. After 40 years of extensive economic regulation of the airline business in the United States, Congress wisely deregulated domestic passenger airline service in 1978. This deregulation has been phased in and will culminate on January 1, 1985. The CAB has fulfilled Congress mandate. Experience since 1978 amply demonstrates that the airlines are better off without rate and route regulation, better able to respond to economic changes, and better able to provide a reasonably priced product to the consumer. It is fair to say that the vast majority of carriers, consumers, and other affected parties do not want to turn back the clock.

The 1978 act clearly transferred the regulatory responsibility over international air service and essential air service to DOT, and we look forward to carrying out our expanded responsibilities in this area. The authority to approve and immunize agreements among carriers from the antitrust laws, a modified form of domestic mail rate authority and a government role in employee protection determinations were also continued and assigned to successor agencies. We fully support these transfers under the statute.

DISPOSITION OF CAB FUNCTIONS NOT TRANSFERRED IN THE 1978 ACT

The 1978 act did not specifically address three CAB functions in the domestic area which are of concern to the committee and the public. We have provided you with our detailed legal analysis, which concludes that the authority provided by title IV of the Federal Aviation Act handle these matters lapses at sunset.

Data collection.—DOT's authority under title 49 is fully adequate to continue all needed data collection on a mandatory basis. Moreover, the Department has been working closely with the CAB for several years to insure the continued adequacy of airline data collection after sunset. We plan no significant changes in this area beyond the culling out of unnecessary reporting. This is a process already underway at the CAB.

Domestic fitness.—Another non-transferring function is that of evaluating the "economic fitness" of domestic carriers to begin or continue service, except for commuter carrier service to EAS-eligible points which remains subject to the "fitness" standard appearing in section 419.

To the extent that financial and management issues bear on safe operations, we are able to rely on the "safety fitness" determination under section 604 of the Federal Aviation Act to reach these issues. Beyond this careful safety review, we believe entry into the domestic airline industry does not justify a separate, initial or continuing "economic fitness" test. Adequate consumer protection regulations, comparable to those applicable to carrier operators, should be sufficient to protect consumers from abuses by new entrants, such as the Hawaii Pacific Airlines example cited in your earlier hearings. Entry into most other commercial activities is not barred by an initial economic fitness examination, and we do not thereby expose the public to unjustified risks. The lapse of a purely economic "fitness" test to enter domestic airline transportation is an appropriate consequence of CAB sunset.

Consumer protection.—The third area of concern to the committee is continuation of the CAB's consumer protection function. While the 1978 act continues this function at DOT for international air service, no agency was specifically named to continue administering the section 411 "unfair trade practices" authority domestically. However, Congress included in section 102 of the act, particularly with respect to domestic air transportation, the policy that "unfair, deceptive, predatory, or anticompetitive practices in air transportation" are contrary to the public interest.

Our legal analysis concluded from this and other legislative history that Congress could not reasonably have meant to leave the consumer totally unprotected from unfair trade practices in domestic air transportation. Clearly, the FTC was originally barred from this area 40 years ago because of the presence of the CAB. Thus, in our view, this consumer protection authority reverts to the FTC the day the CAB goes out of business.

We believe the shift of this authority can be accomplished smoothly without legislation and with no loss of protection to the consumer. DOT proposes to enter into a memorandum of understanding with the FTC, ensuring that the FTC is the lead agency in this area. Under the memorandum of understanding, DOT would conform its international consumer protection rules to the FTC's domestic regulations. Accordingly, the "split jurisdiction" that has concerned some carriers will be more apparent than real.

With regard to the lapse of section 404(a) "safe and adequate" authority, we believe the forces of the marketplace will require the carriers to continue reasonable rules for the separation of smokers and non-smokers in flight.

INSULATION OF THE DECISIONMAKING PROCESS AT DOT

The committee's earlier hearings on CAB sunset, as well as Senator Kassebaum's and your specific inquiries, highlight the question of whether or not DOT or any other executive branch agency should be relied upon to make international route awards and comparable choices among parties impartially, without special, legislatively prescribed protection or "insulation" of the process. My response is an unequivocal "yes."

Congress has already enacted the Administrative Procedure Act to assure fairness in agency actions based on quasi-judicial decisionmaking affecting competing parties on rate or enforcement action with regard to a single party. The agency's decision must be based on a weighing of factual evidence in the matter, and it is accepted that the decision should be based on a written record that contains all the matter brought to the attention of the decisionmaker. As you know, this approach provides a basis for judicial review of the complete record of considerations that went into the decision. We intend to continue the CAB's practice with regard to on-the-record decisionmaking.

Thus, ex parte contacts with the initial or final decisionmaker about any such case will be prohibited. The two staff functions—advocacy of the public interest before the administrative law judge on the one hand, and advice and recommendations to the final decisionmaker on the other hand—will be strictly separated. The preparation of and reliance on a written record will continue, using the same CAB ALJ's in the same situations where oral proceedings are now used.

Despite our plans, there remains concern that impartial decisionmaking will be threatened after sunset because the ALJ's decision will be forwarded to a career civil servant for final action, rather than a tenured, multi-member board of political appointees. In the executive branch, however, it is common to rely on career civil servants to make economically significant distinctions among applicants for federally-dispensed rights, subject in all cases to policy guidance from the Secretary. The important point is that we rely on the scrutiny inherent in public processes, particularly that of the disappointed applicant, as well as the likelihood of congressional oversight or judicial review, to assure fairness in the process.

Our plan for policy oversight of the career civil servant calls for retention by the Secretary of the option to remand a decision to the civil servant for further proceedings where the final decision is contrary to her understanding of statutory policy or the facts of the case. It is important to remember at all times during discussion of this issue that the Secretary will not have the right to enter her own final decision in place of that of the senior civil servant. Given that every action of a cabinet officer is subject to intense scrutiny, and that judicial review of each on-the-record decision is available, we can expect the same fairness of decisionmaking through this mechanism we presently have at the CAB.

This secretarial oversight would be exercised only in novel or extremely significant actions. Congressman Hammerschmidt suggested to the Secretary that it might be helpful to have written guidelines for the exercise of this remand option. The Secretary agrees, and we are drafting criteria for addition to our plan.

You raised the question in your earlier hearing whether the Secretary's oversight of EAS carrier selections and service level determinations should be just as circumscribed as international awards. I believe the cases are different, because EAS involves Federal subsidies made from limited funds. This exerts a natural pressure on the Department to stress efficiency and resist pressures to make awards to the less efficient applicant.

The Department's procedures in EAS cases will be similar to those the CAB now uses. For example, EAS service level determinations will be made by the head of the EAS office, a career official. If there is an appeal, the community will be given the opportunity for an on-site informal hearing, to be conducted by a staff level panel which will make its recommendations to the Assistant Secretary for Policy and International Affairs. In carrier and rate determination cases, the EAS office will negotiate with carriers and analyse their proposals. The head of the EAS office will then draft a final decision for the Assistant Secretary for Policy and International Affairs.

Chairman McKinnon, on behalf of a majority of the Board, made two specific recommendations in his testimony before this committee for improving the DOT insulation plan. First, the career civil servant should have a staff that is equally insulated from influence. The specific concern was with legal advice being provided by the DOT General Counsel's office, which, of course, answers to the Secretary. Second, it was suggested that the deciding official should draft the instituting order that governs the objective criteria for decision, not a policy office that identifies more closely with the Secretary's general policy responsibilities.

I believe the DOT plan satisfactorily addresses these issues. In the case of the instituting order, the policy office and General Counsel's office may make recommendations to the career civil servant, but he or she actually issues and is responsible for the contents of the instituting order. As for legal advice from the General Counsel's office, DOT and many other agencies have the same arrangement for providing legal services to the independent inspectors general. We have had no instances of attempted coercion or other improper influence. As you know, the inspectors general of each agency have a statutory responsiblity to report any such instances to the Congress, and there has been no occasion for such a report. Nonetheless, in reviewing our plan with the CAB staff and with others since its issuance, we have been persuaded of the desirability of the decisionmaker having a small staff of two to three persons to assist him or her in carrying out the duties and responsibilities contemplated by the plan.

SUBSTANTIVE LEGISLATION ON CAB SUNSET OR RELATED AVIATION MATTERS

The Secretary commends the public statements and firm conviction of the chairman of this subcommittee that any CAB legislation originated by the committee will not become the vehicle for undesirable re-regulatory provisions. Of course, opinions vary on what substantive legislation is or is not desirable. Your hearing notice, for example, cites the proposal to shift CAB's antitrust responsibilities to DOT rather than justice. We flatly oppose such a transfer, because this industry is mature and should be subject to the same governmental processes as any other industry. There is no legitimate policy reason to shift antitrust oversight of this industry out of the Justice Department just because it is the airline industry.

As to the specific transportation benefits that should be taken into account in reaching any agreement approval and immunity decisions under sections 412 and 414, DOT is comfortable with our present and continuing ability to file comments with the Justice Department. Also, we are in the process of reaching understandings with the Department of Justice on a clear division of authority, with DOT responsible for approval of international rates and related matters, leaving approval of organic agreements at justice. In the domestic arena, justice has already announced that it will consider granting limited antitrust immunity to prevent treble damage recoveries where approved conduct is likely to be the object of vexatious litigation.

As for the many non-sunset, substantive changes in the law that are candidates for attachment to any sunset legislation, most appear to us to be contrary to the administration's goal of deregulating the domestic industry. Suggestions to re-regulate fares, mandate conditions for joint fares, and immunize travel agent practices from antitrust laws, are but a few of the ideas floating around in search of an appropriate legislative vehicle. We continue to oppose them.

We also oppose schemes to recreate the CAB in DOT, including proposals to transfer all consumer functions and antitrust authority to DOT, as well as the suggestion that a new, Civil Aviation Administration be created within DOT. If we are truly to sunset the CAB and to put the era of domestic airline regulation behind us, we must disperse these functions consistent with the provisions of the 1978 Deregulation Act, with the Justice Department handling antitrust matters, the postal service administering airmail rates, the Federal Trade Commission assuming consumer protection authority, and the Department of Transportation overseeing international transportation policy and small community air service subsidies.

This concludes my prepared remarks. I would be pleased to respond to any questions from you or the committee.

Mr. MINETA. Please proceed.

TESTIMONY OF HON. JIM BURNLEY, DEPUTY SECRETARY OF TRANSPORTATION, DEPARTMENT OF TRANSPORTATION

Mr. BURNLEY. I will go through, quickly, a condensed version of the prepared testimony that has been provided for the record.

I appreciate the opportunity to appear before your subcommittee today, to detail the Department of Transportation's position on legislative proposals for CAB sunset and related substantive matters.

As the chairman mentioned, Secretary Dole appeared before this subcommittee February 29 and advised you of our basic position on CAB sunset legislation. We believe that the provisions of the 1978 Airline Deregulation Act accomplish sunset, and that any additional legislation at this point could become the magnet for diverse amendments by special interests that could confuse or interfere with orderly sunset of the CAB.

Secretary Dole, on the 29th, assured you that the Department would judge clarifying legislation on its merits before making a recommendation to the President about whether or not he should sign it. One of the primary criteria she will use in reviewing any such legislation is the requirement that it not change the existing jurisdictional arrangement for sunset.

Returning for a moment to disposition of certain CAB functions that were not in the 1978 act. There were three areas in the domestic area that were not addressed that are of concern to the committee and the public.

We gave you our detailed analysis, which concludes that this authority provided by title IV lapses at sunset. Let me touch upon each of them specifically and briefly.

As to data collection, DOT's authority under title 19, United States Code, is totally adequate, we believe, to continue all needed data collection on a mandatory basis. Moreover, the Department has been working closely with the CAB for several years to insure the continued adequacy of airline data collection after sunset.

We plan no significant changes in this area, beyond the culling out of unnecessary reporting. This is a process already underway at the CAB.

Another nontransferring function is that of evaluating the economic fitness of domestic carriers to begin or continue service, except for commuter carrier service to EAS-eligible points, which remains subject to the fitness standard appearing in section 419.

To the extent that financial and management issues bear on safe operations, we are able to rely on the safety fitness determination under section 604 of the Federal Aviation Act to reach these issues. Beyond this careful safety review, we believe entry into the domestic airline industry does not justify a separate initial or continuing economic fitness test.

Adequate consumer protection regulations comparable to those applicable to carrier operators should be sufficient to protect consumers from abuses by new entrants, such as the Hawaii Pacific Airlines example cited in your earlier hearings.

Entry into most other commercial activities is not barred by an initial economic fitness determination or examination. And we do not thereby expose the public, in our judgment, to unjustified risk.

The lack of the purely economic fitness test, to enter domestic airline transportation we think is an appropriate consequence of CAB sunset.

Turning for a moment to the consumer protection issue, which I know is of great concern to the committee, as you noted in your opening statements, is continuation of the CAB's consumer protection function. While the 1978 act continues this function at DOT for international air service, no agency was specifically named to continue administering the section 411 "unfair trade practices" authority domestically.

However, Congress included in section 102 of the act, particularly with respect to domestic air transportation, the policy that "unfair, deceptive, predatory or anticompetitive practices in air transportation" are contrary to the public interest. Our General Counsel's legal analysis concluded from this and other legislative history that Congress could not reasonably have meant to leave the consumer totally unprotected from unfair trade practices in domestic air transportation.

Clearly the FTC was originally barred from this area 40 years ago because of the presence of the CAB. Thus, in our view, this consumer protection authority reverts to the FTC the day the CAB goes out of business.

We believe the shift of this authority can be accomplished smoothly, without legislation, and with no loss of protection to the consumer. DOT proposes to enter into a memorandum of understanding with the FTC insuring that the FTC is the lead agency in this area. Under such a memorandum of understanding, DOT would conform its international consumer protection rules to the FTC's domestic regulations.

Accordingly, this split jurisdiction which has concerned some carriers will be more apparent than real.

With regard to the lapse of section 404(a), "safe and adequate" authority, we believe the forces of the marketplace will require the carriers to continue reasonable rules for the separation of smokers and nonsmokers in flight.

And let me turn for a moment to another issue that has been discussed in the previous hearing. The committee's earlier hearing, as well as Senator Kassebaum's and your specific inquiries, Mr. Chairman, highlight the question of whether or not DOT, or any other executive branch agency should be relied upon to make international route awards and comparable choices among parties impartially, without special legislatively prescribed protection or insulation of the process.

My response and that of Secretary Dole that you heard on the 29th is an unequivocal "Yes." Congress has already inacted the Administrative Procedure Act to ensure fairness in agency actions, based on quasi-judicial decisionmaking. The agency's decision must be based on a weighing of factual evidence in the matter. And it is accepted that the decision should be based on a written record that contains all of the matter brought to the attention of the decisionmaker.

As you know, this approach provides a basis for judicial review of the complete record of considerations that went into the decision. We intend to continue the CAB's practice with regard to on-the-record decisionmaking. Thus, ex parte contacts with the initial or final decisionmaker about any such case will be prohibited.

The two staff functions—advocacy of the public interest before the administrative law judge on the one hand, and advice and recommendation to the final decisionmaker on the other hand—will be strictly separated. The preparation of and reliance on a written record will continue, using the same CAB administrative law judges in the same situations where oral procedures are now used.

Turning for a moment, if I might, to the Department's procedures in EAS cases, we will use procedures there that are similar to those the CAB now uses. For example, the EAS service-level determinations will be made by the head of the EAS Office, a career official.

If there is an appeal, the community will be given the opportunity for an onsite informal hearing, to be conducted by a staff-level panel, which will make its recommendations to the Assistant Secretary for Policy and International Affairs.

In carrier and rate determination carriers, the EAS Office will negotiate with carriers and analyze their proposals. The head of the EAS Office will then draft a final decision for the Assistant Secretary for Policy of International Affairs.

The Secretary commends the public statements and the firm conviction of the chairman of the subcommittee that any CAB legislation originated by the committee will not become the vehicle for undesirable reregulatory positions. Opinions vary on what substantive legislation is or is not desirable. Your hearing notice, for example, cites the proposal to shift CAB's antitrust responsibilities to DOT, rather than Justice.

As you noted in your opening remarks, Mr. Chairman, we flatly oppose such a transfer. Because, in our judgment, this industry is mature and should be subject to the same governmental processes as any other industry. There is no legitimate policy reason, in our view, to shift antitrust oversight of this industry out of the Justice Department, just because it is the airline industry.

As to the specific transportation benefits that should be taken into account in reaching any agreement approval and immunity decisions under sections 412 and 414, DOT is comfortable with our present and continuing ability to file comments with the Justice Department.

Also, we are in the process of reaching understandings with the Department of Justice on a clear division of authority, with DOT responsible for approval of international rates and related matters, leaving approval of organic agreements at Justice.

In the domestic arena, Justice has already announced that it will consider granting limited antitrust immunity to prevent treble damage recoveries, where approved conduct is likely to be the object of vexatious litigation.

As for the many nonsunset, substantive changes in the law that are candidates for attachment to any sunset legislation, most appear to be contrary to the administration's goal of deregulating the domestic industry. Suggestions to reregulate fares, mandate conditions for joint fares, and immunize travel agent practices from antitrust laws, are but a few of the ideas floating around in search of an appropriate legislative vehicle. We continue to oppose all of them.

We also oppose schemes to recreate the CAB inside DOT, including proposals to transfer all consumer functions and antitrust authority to DOT, as well as the suggestion that a new Civil Aviation Administration be created within DOT. If we are truly to sunset the CAB, and to put the era of domestic airline regulation behind us, we must disperse these functions, consistent with the provisions of the 1978 Deregulation Act, with the Justice Department handling antitrust matters, the Postal Service administering air mail rates, the Federal Trade Commission assuming consumer protection authority, and the Department of Transportation overseeing international policy and small community air service subsidies.

Mr. Chairman, that concludes a condensed version of our prepared statement, and I would be happy to answer any committee questions.

Mr. **MINETA**. Thank you very much, Mr. Secretary. The Department of Transportation's legal analysis argues that the most important of the consumer protection authority, section 411 prohibiting deceptive practices and unfair competitive practices, would in the absence of legislation be in effect, replaced by similar section 5 authorities of FTC.

However, section 5 of the FTC specifically exempts "air carriers, and foreign air carriers subject to the Federal Aviation Act" from regulation by FTC. Your legal analysis argues that despite that expressed statutory exemption from FTC authority, the FTC would still exercise its section 5 authority over those same air carriers. And I am wondering, how can that possibly be?

Mr. **BURNLEY**. Mr. Chairman, in the opinion of our General Counsel that was prepared late last fall, we do go into a good deal more detail on this issue than I will be able to go into today. First and foremost, I would like to be sure that our opinion is made a part of the record.

Mr. **MINETA**. Without objection, so ordered.

[The opinion of the General Counsel, Department of Transportation, may be found on page 29.]

Mr. **BURNLEY**. We think that you have to look beyond simply the language of the statute as you do with any statute when you try to determine the intent of the Congress. And in this case, particularly given the language in section 102, which I quoted in my prepared testimony of the 1978 act, it seems to us very clear that the Congress in 1978 did not intend to sunset these responsibilities in the Federal Government for consumer protection.

Congress explicitly said that it thought those were important responsibilities and wanted to see the public get continued protection. When you look back at when that 5(a) exclusion first came from in the FTC's authorization act, you find that it was inserted in the act in 1938, simultaneously with the creation of the CAB.

The Congress said at that time they were taking this step because "for the present." And that is a phrase that appears specifically—"for the present" it appears that one Federal agency ought to have responsibilities with respect to commercial aviation matters and regulation thereof.

And as you know, of course, in 1938 the safety responsibilities and the economic regulatory responsibilities were all put in the same agency.

We conclude this, given the fact that that is where this exemption from FTC authority first appears, and given the fact that in 1978 Congress determined that it wished to move away from the 1983 approach of having all responsibilities consolidated in one place and, to the contrary, made a decision that some of the responsibilities on residual matters would go to the Justice Department, some to DOT, some to the Postal Service, and in our judgment, intended by operation of law for consumer protection, to revert into the FTC's jurisdiction, so that the FTC could assume these responsibilities.

Now we think that that reasoning is sound. We think that the Congress certainly did not intend in 1978 for all consumer protection activities of the Federal Government regarding domestic air carriers to end. Our position is that legislation in this area is therefore unnecessary.

We certainly would not object to a simple amendment to section 5(a) of the FTC's authorization statute if there are those who feel strongly about the need to make very clear in that statute the FTC's authority, but we do not believe it is necessary. Our view is that, given the risk of moving any legislation and given the fact that the 1978 statute, we think, is a pretty good statute on the whole, that it would be best to let the operation of law go ahead and solve this problem.

Mr. MINETA. Just going back over this, it seems to me that the issue under section 5 is whether the carriers are subject to the Federal Aviation Act. Wouldn't they be subject to title 6 of the act, regulating safety and to a variety of provisions in title 4 including sections 408, 409, 412, and 414 and also route and rate regulation for international flights.

How can you conclude that airlines would not be subject to the Federal Aviation Act?

Mr. BURNLEY. We have not reached that conclusion, Mr. Chairman. We have concluded that when the Congress used that phraseology, which appears in the 1958 version of the act, that it clearly intended for that exemption from the FTC's general consumer protection responsibilities to continue so long as there was a CAB.

Again, that is where it originated in the first place, back in 1938.

We simply feel very strongly that the Congress in 1978, having on the one hand expressed a clear intention for consumer protection responsibilities to reside somewhere in the Federal Government, and on the other hand calling for the sunset of the CAB at the end of this year, was in effect lifting the 5(a) exclusion. We think that this is not an unreasonable position at all.

There is a strong legal basis for it—in effect removing that exemption from 5(a). Concededly, the wording could have been more artfully drawn, in the sense that it could have explicitly said "upon the demise of the CAB" or "upon CAB sunset," but we think that is clearly the intent of the Congress when you read the 1978 act and when you look back through the legislative history as to where that provision came from in the first place.

Mr. MINETA. In the Department of Transportation legal memorandum, or the analysis—and we have made that a part of the record—you conclude that the preemption section would continue to apply after sunset.

The critical language provides that carriers must have authority under title 4. Now to reach the conclusion, that we do not need preemption legislation, you appear to be making a very broad construction of when carriers are subject to the Federal Aviation Act.

Yet, when the issue is section 5, you seem to be making a very narrow interpretation of when carriers would be subject to the Federal Aviation Act.

Isn't there some inconsistency between your interpretations or are you engaging in what lawyers sometimes call a result-oriented analysis?

Mr. BURNLEY. Certainly I think, Mr. Chairman, that we are satisfied with the result of our analysis. [Laughter.]

I do not think that it is inconsistent for us, in each instance, to try to reasonably construe the intent of Congress. And in fact when you are reading any statute, when you look back into the history of how that statute came to be on the books, in some cases if you look as your benchmark for the most literalistic reading, you may be guilty of a narrow reading of one section but a broader reading on another section.

We understand this to be part of the executive branch's obligation—to try to discern the precise intent of Congress.

Certainly as to the section 105 preemption issue, we think that our legal reading is well grounded and we have relied in part on the policy statement issued by the CAB on this subject, which is found in "Subpart J, Policies Relating to Federal Pre-Emption of State Economic Regulations" of part 399 of part 14 of CFR.

Not only have we taken the position that there is no need for concern in this area, but we also believe that the CAB's activities in this area and their interpretation of this is consistent with our position.

I must tell you that I am not overly concerned that, in trying to read through the 1978 act and construe it as best we can to proper congressional intent, that we may be accused of the kind of superficial inconsistency that you speak of.

Mr. MINETA. As you indicated earlier, generally the courts look to legislative intent and legislative history when the meaning of statute is unclear.

Here, however, there does not seem to be anything unclear. The statute says flat out that the FTC has no authority over air carriers subject to the Federal Aviation Act.

What is the likelihood that in the face of unequivocal statutory language like that, that some judge is going to be persuaded by a legislative intent argument?

Mr. BURNLEY. Mr. Chairman, as an attorney I have long ago learned that it is very bad business to try to predict what a particular judge may do on a given day in a given case. But we think that any reasonable reading of the 1978 act will lead to this conclusion.

Now if section 102 of the 1978 act did not include very plain, explicit language that the Congress intended consumer protection functions to continue to be a responsibility of the Federal Government, I think this would be a much tougher case for us to make, much tougher.

But with that language in the statute, as FTC has pointed out in its own General Counsel's opinion, which as you know comes out somewhat differently on this issue from our General Counsel's opinion, you have two statutes that appear to be irreconcilable. Then you really have to look behind the language in each and construe congressional intent. We think this is precisely the case that we face as to how we read 102 on the one hand and the 5(a) barrier to FTC jurisdiction on the other.

Again, certainly it is possible to draft section 5(a) in a more explicit way, but we do not think that is an unreasonable reading, given the 102 language.

Mr. Mineta. I have talked with a number of people in the aviation industry who hold a variety of views on whether 411 should be preserved and where it should be preserved, and I cannot find anybody who agrees with the Department's analysis on the point that in the absence of legislation FTC can exercise anticompetitive practice authority over airlines. More specifically, the agency you believe will, on January 1, have the authority to regulate anticompetitive practices, the FTC itself, does not believe as you just mentioned, that it would have that authority.

In testimony that we will hear a little later from them, they say, and I quote, "Let me make clear that absent further legislation, the FTC would be precluded from exercising any unfairness or deception of authority over air carriers. That is because of an exception written into section 5 of the FTC act for air carriers and foreign air carriers subject to the Federal Aviation Act of 1958. One simply cannot infer that Congress intended the FTC to take over the consumer protection role for this industry."

Now whatever anyone else thinks, if the agency in question believes that it does not have the authority, they clearly are not going to exercise it. Can we be expected to act on the basis of your legal analysis when the FTC's legal analysis is the exact opposite?

And so for that matter, as we will hear from GAO later today, isn't DOT's legal analysis academic if FTC disagrees and will not exercise the authority?

Mr. Burnley. Mr. Chairman, let me respond in two ways to that.

First, we would certainly hope that the FTC would continue to review this matter and come to what we believe to be the more enlightened view and so we have not quite given up on that possibility.

Second, I have read Commissioner Douglas' prepared testimony today, and he does say that which the FTC's General Counsel said in its opinion. That is that they disagree with our judgment that by operation of law this exemption to their jurisdiction under 5(a) would be removed.

However, he does not speak at all to another passage in the FTC's opinion, in fact, two passages worthy of note in the General

Counsel's opinion. One is that even that opinion concedes that on a given day, a Federal judge might rule in DOT's favor even though the FTC's General Counsel thinks that it might be an incorrect ruling. But second, that opinion goes on to say that the FTC believes that it does have jurisdiction as to some matters and if I can call the committee's attention specifically to the passage I am thinking about, at the end of the opinion it says:

> Finally, it should be noted that the Commission now has some limited jurisdiction over air carriers subject to the Federal Aviation Act and will obtain additional limited authority under some special statutes. The Commission has authority to conduct investigations of air carriers, since section 6 of the FTC act, the basic source of the Commission's investigatory power, does not exempt air carriers from its scope.

They then go on and use an example of the Equal Credit Opportunity Act as a case where they say, by operation of law apparently, they are going to get jurisdiction over some matters that the CAB may now have primary jurisdiction over.

That is another reason why we feel perhaps upon further reflection they may come to agree with our view of how this ought to work, because their own opinion does certainly give us some reason to believe that they intend to exercise jurisdiction in this area.

Mr. MINETA. We have not seen that particular memorandum that you are referring to. I guess it would be most appropriate to ask Mr. Douglas to submit it for the record.

Mr. BURNLEY. Yes, sir, I would think it inappropriate for me to provide someone else's opinion. I would assume that the committee had seen this but this is what we have been told is the opinion of the General Counsel in this matter.

Mr. MINETA. Last December your Department made a case to the Cabinet Council that in the absence of legislation FTC could exercise section 5 authority over airlines and on the basis of that representation, the Cabinet Council endorsed the Department's no bill position and made it the administration's position. Did you bother to consult with FTC as the agency in question to see if they concur in your legal analysis before you got the Cabinet Council to commit the administration to your proposal?

Mr. BURNLEY. I cannot tell you sitting here, Mr. Chairman, to what extent there were staff-level contacts. We have some ongoing staff-level contacts. It would probably be inappropriate for me to suggest that they occurred precisely before or after the Cabinet Council meeting. All I can tell you is that we had quite a few discussions with the FTC about this, and we have been aware for some time of the fact that they read 5(a) and the exemption somewhat differently.

Mr. MINETA. Even though you did not consult with FTC, was the Cabinet Council informed that——

Mr. BURNLEY. I did not attend that meeting. Secretary Dole made a presentation there. I do understand, and again I will have to defer to those who were present, that at that session we made clear that this position was one about which reasonable men might differ. I do not know that we explicitly talked about the FTC's position at that point. And the FTC, of course, is an independent Federal regulatory agency that does not participate, ordinarily, in Cabinet Councils.

Mr. MINETA. Will you please submit that for the record.

Mr. **Burnley**. I would be happy to double check with those who were present, yes, sir.

[The following was received from Mr. Burnley:]

The Department of Transportation's presentation December 19, 1983, to the Cabinet Council on Commerce and Trade concerning CAB sunset did not set forth the Federal Trade Commission's (FTC) legal view on the reversion of domestic air transportation consumer protection upon CAB sunset to the FTC by operation of law. DOT did make clear who subscribed to the DOT legal analysis by stating to participants in the Cabinet Council that—

"The Department of Transportation, the Department of Justice and OMB believe that the sunset provisions are sufficient to continue necessary domestic authority, but the affected parties do not agree in all cases."

DOT directly addressed the question of reversion of consumer authority to the FTC by stating:

"The Board's "unfair competitive practices" authority (Section 411) would revert to the FTC under a reasonable interpretation of the 1978 ADA and the FTC Acts. However, a better method to return this role to the FTC would be to repeal the existing exemption of air carriers that is found in Section 5 of the FTC Act. The pending FTC authorization bill could be an appropriate vehicle for doing this. FTC can also use its authority to carry out those consumer functions which CAB also administers under Section 404(a) domestic authority to assure "safe and adequate" air transportation (except for the "Smoking" regulations).

The Department concluded: "It is our view that a solid legal basis exists for an acceptable CAB sunset process within existing statutory authority."

Mr. **Mineta**. Mr. Hammerschmidt.

Mr. **Hammerschmidt**. Thank you, Mr. Chairman. And thank you, Secretary Burnley, for your testimony.

Mr. Secretary, as you know, section 404(a) of the Federal Aviation Act has been used by the CAB to issue regulations involving smoking and certain other regulations dealing with the transportation of handicapped persons. You have already touched on the Department's position on smoking rules.

Mr. **Burnley**. Yes sir.

Mr. **Hammerschmidt**. But on the handicapped persons part of it, if no legislation is passed transferring section 404(a), these rules would terminate. And I wonder if that gives you any problem? I am also interested in the two different sections that handle these issues for subsidized carriers versus nonsubsidized carriers. As you know, subsidized carriers come under section 504 of the Rehabilitation Act and nonsubsidized carriers come under section 404 of the Federal Aviation Act.

I wonder if you would comment on that?

Mr. **Burnley**. Our view is that this may be one of the clearest cases where, at first glance, there is a problem but at second glance, in fact, there is not a real problem. As to subsidized carriers, clearly we will have the authority, we think, through the EAS program, to continue the regulations in that area because under section 504 anyone who receives Federal assistance is required to take certain steps to insure handicapped access. And we set those out through regulatory procedures, as you know, to avoid discrimination against the handicapped.

However, we also have, already on the books and in place, regulations that work precisely the same way, that forbid discrimination against the handicapped at all airports which receive any Federal assistance. And I think that you will find, upon looking through those, that they are more than adequate because they even speak to the need for enplaning and deplaning facilities for the handicapped.

They require accessible ticketing. They require baggage be handled in a way that makes service accessible. They provide rules on waiting area facilities. So the only area where we think there is any conceivable gap at all, is the interior of the airplane. And under the CAB's past practice we have not had regulations which require, for example, wheelchair accessible aisles on commercial aircraft.

Our review of this has led us to the conclusion that with what we already have on the books, for federally assisted airport facilities—and that is every airport in this country that has commercial traffic—and in addition to that, the continuing authority that we will assume from the CAB as to the EAS carriers who are subsidized, that there will not be a serious problem.

Mr. **Hammerschmidt**. Let me read from part 382 of the CAB rules:

> A carrier subject to this part shall not directly, or through contractual licensing or other arrangement, on the basis of handicap, exclude a qualified handicapped person from or deny that person the benefits of any air transportation * * *.

Et cetera, et cetera.

Is that what you are relying on?

Mr. **Burnley**. No, sir. We are relying on our own DOT 504 regulation.

Mr. **Hammerschmidt**. Would your rules cover this also?

Mr. **Burnley**. We think they would cover this, but they cover it in a slightly different fashion, in that the airport is required to have facilities available which permit deplaning and enplaning of handicapped persons, without discrimination. So we think that gets to the issue in a little different fashion.

Now we are going to continue to explore this issue a little bit further. And if there is any gap at all in the area that you just made reference to in your question, we believe we probably would have authority. In fact, I don't think there is any question that we would have the authority to require a federally assisted airport in its contracts with carriers, who are given the right to use the facilities at those airports, that they provide that there will be no discrimination against the handicapped.

And, in fact, my understanding is that such provisions may already be in a number of such contracts around the country.

We do not see that this is a serious problem. Even without taking the additional step, we think that the deplaning/enplaning provisions are adequate.

Mr. **Hammerschmidt**. You said you had to worry about the inside of the aircraft. DOT rules will not apply to the inside of the aircraft, is that correct?

Mr. **Burnley**. We do not know at this point, Congressman Hammerschmidt, how we would find authority or how that authority could be properly exercised, other than through contractual arrangements which would, in fact, be effective, we think to get to the interior of the aircraft itself. As for going further than the CAB has tried to get to the interior of the aircraft itself as to accessibility, it is the enplaning and deplaning which we think takes care of the problem.

But since the aircraft itself is not federally subsidized, in most cases, and the company flying it, except for the EAS subsidized carriers, are not federally subsidized, section 504 would not permit us to reach directly to that aircraft. So we think if there is a gap at all, we can get at it indirectly through the fact that the airports are federally assisted.

Mr. **Hammerschmidt.** There appears to be considerable support for the proposition that the functions now performed by the CAB should be transferred to DOT since it would assure that one agency would have all of the civil aviation authority, both as it relates to safety and economic regulations. It appears to me that this idea has merit, since it would tend to minimize the potential disruptive effects of CAB's sunset and assure that the agency with the greatest expertise in air transportation performs these important functions.

I wonder, why is DOT so negative about this? And let me comment further. When this administration was advocating the earlier sunset of the CAB, during the last Congress, it supported the proposition that antitrust authority would be more appropriately housed in DOT. The administration has done a complete turnaround on the issue. Since the arguments you have made previously today, in favor of having this authority go to Justice, were well known at that time, why has the administration totally changed its position on the issue?

Mr. **Burnley.** After the 1981 exercise which as you know, did not result in new legislation in this area, the administration reviewed all of these issues once again in preparation for sunset at the end of this year. We simply concluded that the better approach, in our judgment, would be a no bill approach. And we came to the conclusion that the Justice Department, within the executive branch, is on balance better equipped to handle antitrust issues than any other Cabinet-level department, most particularly including the Department of Transportation.

There is not any question we have taken a different view, and it has happened through the process of discussion and review of how sunset ought to work, and in looking at what would be involved in an exercise to amend the 1978 act.

Now back to the first part of your question. If the Congress, in fact, in 1978, meant what it said—which is that the CAB should sunset as of January 1, 1985—then we do feel quite fairly that there ought to be a real, rather than illusory, sunset. To simply move the CAB, as it now functions, across town and set it up within the walls of DOT is, in our judgment, not sunset.

Furthermore, it leaves the door wide open, in future years, should there be any serious movement to reregulate the economic side of commercial aviation, to have the vehicle very much at hand to do it—that is, a continuing CAB, simply renamed perhaps and readdressed, within DOT.

So our sense has been if we're going to have sunset, and we think sunset is a very laudable goal, we're very much in favor of it as you know, then we ought to have real sunset. And that is, in part, what drives our position.

On balance, the FTC can handle consumer protection and Justice can handle, we think, quite well the antitrust responsibilities in the domestic area. And we will handle the areas specifically assigned to us by the 1978 act.

Mr. HAMMERSCHMIDT. Mr. Secretary, I appreciate what you have just said, and we realize that you do not want to create some other CAB within DOT or some other modal authority, but yet I think there is some thought that maybe you could move authority to DOT and let you just do your thing as you saw fit, without specifically mandating the way that the authority should be handled.

Mr. BURNLEY. That is certainly the approach we have recommended to the Congress, as to the functions you assigned us in 1978. We are not uncomfortable with it within that basic framework.

Mr. HAMMERSCHMIDT. Thank you, Mr. Chairman.

Mr. MINETA. Mr. Vandergriff.

Mr. VANDERGRIFF. Mr. Chairman, since I was so tardy—for which I apologize to you, sir, and to Secretary Burnley—I need to defer to those of you who heard his presentation.

Mr. MINETA. Mr. Packard.

Mr. PACKARD. Thank you, Mr. Chairman.

Mr. Burnley, one of the issues that we will have to decide is whether or not we should put an outside time limit on the Government's authority to grant antitrust immunity in various circumstances. Do you believe in an expiration date for this authority? Is that desirable?

Mr. BURNLEY. Congressman, I do not think that would be a useful exercise. I do think, as Assistant Attorney General McGrath will tell the committee later today—and I did have a chance to see his prepared statement late yesterday—the Justice Department has a very reasonable and well thought out approach to assuming these responsibilities. I think it would be better if the Congress monitored, as I am sure it will, and closely scrutinized how Justice carries out those responsibilities.

And if you see, down the road, any difficulties in that regard, then certainly you will be in a position, as always, to pass appropriate legislation then. But I do not know, at this point, of the need for new legislation that would specifically put deadlines on the date for certain antitrust immunities being at least available, if Justice sees fit to grant them.

Mr. PACKARD. I am sure you are aware that some airlines are concerned about the prospects that the larger carriers will abruptly terminate interline agreements with other carriers, as a competitive response to the actions of some of the carriers. American Airlines recently announced that it was terminating its interline agreements with Continental, perhaps partly because it was upset that Continental's promotion would discourage passengers from riding American, by trading coach seats for first class on Continental.

Do you believe that these recent American Airlines activities will actually induce the breakdown of additional interline agreements?

Mr. BURNLEY. Congressman, if I may, I would like to beg off on trying to make a judgment as to whether the motivation behind American's activities or the effect of its activities—to the extent that we know about them at this date—are anticompetitive. The reason I would like to beg off on that is I do feel that until the end of this year that is primarily a matter for the CAB to review. And we would, as the Department of Transportation always does in a matter of that sort, perhaps be required to file comments on the record. And that would be the appropriate place for us to really get into it.

After sunset, an issue of that sort, we think, can be handled by the Department of Justice under the terms of the 1978 act. And if—whether it is American or any other major carrier, I do not want to single them out even in an answer for a hypothetical matter—engages in conduct which causes some concern about its competitive impact, we think the Justice Department will have all the authority it needs to get into that matter. And again, to the extent that it might get into it through exercise of its antitrust immunity responsibilities, I think you will find that the Department of Transportation will be quite aggressive in making its views known through that process, just as we do now in the CAB proceedings.

Mr. PACKARD. Regarding handicapped passengers, what happens when an airline tells a passenger not to bring a wheelchair on board?

Mr. BURNLEY. Well, sir, just as a practical matter, I cannot imagine on the larger jets that that is going to be the kind of cruel, hard-hearted attitude that we will face. But again, to the extent that there is any concern in this area, we think that specifically would be covered by the enplaning and deplaning regulations we have already got on the books at DOT. The requirement of the airport might well be such that it would have to require of the carriers that they make available whatever facilities are needed to permit somebody who has a wheelchair to enplane and deplane with the wheelchair.

Again, if there's any gap in that area, we think that is one that probably can be closed through requirements that we can enforce through regulatory activities, that say to the federally assisted airports, "when you sign contracts with carriers, these provisions have got to be clearly covered."

I do not really see that as a gap.

Mr. PACKARD. As you know, the CAB thoroughly investigates domestic air carrier fitness in a separate proceeding. And full hearings can be conducted if necessary. The Board's process has weeded out some carriers whose resources have not been adequate to begin service.

Are you making fitness one small part of the safety certification? Will it get lost in a shuffle or will it cease to become a viable factor in determining whether a carrier should be permitted to operate?

What plans do you have for assuring that this does not happen?

Mr. BURNLEY. I think it useful, first, to look at the recent experience of the CAB in this area. The statistics that they have provided to us indicate that most of the cases where they have discovered a problem and refused to certify on fitness grounds have involved the commuters air carriers. And as to the EAS subsidized commuters, of course, we will continue to have responsibilities in that area, just as the CAB does now.

But under section 401, over the last 5 years there have been only 11 disapprovals on fitness grounds, out of 267 fitness determinations. So I think first it is important to put in perspective how frequently this seems to be a real-world problem.

In fact, it seems to be a real-world problem in only a veritable handful of cases. Having said that, however, we certainly think that we have the responsibility to continue the fitness exercise to the extent it relates to safety matters. And that is a line that we are in process of drawing up internally right now.

We already have available to us on the books, a procedure under 604 which gives the FAA its basic authority in safety related matters, to conduct formal factfinding hearings to allow those who want to contest the right of a carrier, or the ability of a carrier to fly safely, to come in and put on the record the basis for those concerns.

We have an appeal procedure that goes directly to the U.S. Court of Appeals under section 1006 of the Federal Aviation Act. And that is all in place.

Now it is not a procedure that the FAA uses at this point. We have not had a lot of call for use of it. But it is there. We do not even have to write new regulations in that area. This provides, we think, an appropriate forum, to the extent that there are safety related fitness issues.

We would draw the line there very clearly, however, where the fitness exercise gets into nonsafety related issues. For example, consumer protection issues: Is a carrier defrauding or threatening to defraud those who do business with it? We think those are issues that can be handled by the folks who handle the consumer protection functions, the FTC.

Beyond those kinds of specific issues where there would be jurisdiction, we think part of the sunset deregulatory exercise that Congress mandated in 1978 is to get the Federal Government out of that business.

We have no intention of being reticent about exercising our safety related responsibilities. Quite to the contrary. Secretary Dole has repeatedly made clear in the time she has been Secretary how important those functions are. And has done a good deal to beef them up. But that is where we draw the line.

And as to the subsidized carriers, the fitness exercise would continue and get over into some nonsafety related issues just as they do now at the CAB. That seems to us to be a very appropriate function, when you are talking about Federal tax dollars being used to subsidize private companies. We think we do have an obligation there to protect the taxpayers as well as the people who fly, to make sure that those dollars are going to go into the hands of folks who can use them in a competent and efficient manner.

Mr. PACKARD. Thank you, Mr. Chairman.

Mr. MINETA. Thank you, Mr. Packard. Mr. Secretary, your testimony on protecting the handicapped on board flights suggested that you would require airports to contract with the air carriers to regulate terms of service for the handicapped.

Now, isn't this a dangerous precedent, which would make airports into mini-CAB's, to borrow a favorite phrase of the Department, making them agencies to regulate service.

I am wondering, could airports also have contractual provisions on what type of meals are served, if you're going to get into the aircraft as well by this kind of a contractual arrangement.

Mr. **Burnley.** I do not think, Mr. Chairman, it opens that particular Pandora's box at all. We have recognized now for two decades and more in this country that there are certain categories of discrimination that are simply not acceptable and discrimination against the handicapped is very much one of those areas where the Congress has spoken quite clearly.

Where you have a facility that is built largely, or substantially with Federal funds. We think that certainly would give us the right to say to the local airport operators, "Do not do business with people that discriminate against the handicapped." Just as I don't think it would cause any great pause, nor would it threaten to open up a whole panoply of new regulatory activity by local airports when we say which it is my understanding we now say, "Do not do business with people that discriminate on the basis of race." We would view it as very much within those bounds, and not a dangerous sort of precedent that would perhaps open up all kinds of economic regulations.

Mr. **Mineta.** That raises two questions. Who determines what act is discriminatory? And secondly, what is the remedy? To whom does the handicapped person go to if discriminated against?

Does that person have a private right of action against the airline for violating the contract with the airport? Where does that person go? Or would it be better to continue the present system, where a passenger who is discriminated against at least has some regulatory agency to turn to for protection?

Mr. **Burnley.** Mr. Chairman, I think they do have somebody to turn to. It will be DOT. Again, we have regulations on the books. And if you are discriminated against at a federally assisted airport in this country right now, you have a right to come tell us about it and seek relief.

Mr. **Mineta.** You said, a contractual agreement would be reached between the airport and the airline.

Mr. **Burnley.** I said that was one mechanism.

Mr. **Mineta.** And you're saying that DOT because of the Federal grant going to the airport can enforce a remedy against the airline through the airport.

Mr. **Burnley.** No, sir. What I am saying is that we think right now we have got a clear responsibility. If somebody comes in and says I have been discriminated against at a particular airport that is federally assisted, that handles major commercial traffic, we have a clear responsibility to look into it and to assist that person in making sure that there is relief.

Now, the extent that we can take it the next step, and that is the matter we mentioned earlier, that we are now exploring. If there is any gap at all, if the enplaning and deplaning requirements that we now impose do not suffice to solve this problem, then we think without any question we can say to the airport operators, "You have got to make sure in your contracts that the people that are doing business in your facility—landing there, taking off, enplaning, deplaning—do not discriminate in this fashion."

And again, we would get at that through the fact that we provide the Federal subsidies. So that I think the handicapped would have a clear right to come back to us on that basis, just as they do now. Whether or not that creates an implied private right of the action, I certainly do not wish to sit here and speculate on at this point.

And if the committee wishes, we can do some research on that. But I do not know, sitting here, whether we would have a problem in that regard or not.

Mr. **Mineta**. Returning to the smoking regulation aspect of section 404. Your proposal would mean an end to existing regulations, providing smoking and no-smoking sections aboard the aircraft.

You support that because, as you say in your testimony, you believe "the forces of the marketplace will require the carriers to continue reasonable rules for the separation of smokers and nonsmokers."

I am somewhat confused however, as to the Department's views on the role of the marketplace in governing smoking. Here you are saying the marketplace is enough, and not even the existing rules are necessary. No authority at all should be retained.

A few months ago, however, in the Department's formal comments to the CAB, in its proposed rulemaking, the Department took the position that not only was the marketplace not enough, but existing rules were not enough. In fact, the Department not only wanted tighter Government regulation of smoking, it wanted the tightest regulatory proposal available for comment, the so-called 2-hour rule. I would like to ask which is the Department's real position on smoking regulation and the marketplace.

Mr. **Burnley**. I do not think there is any inconsistency there at all. When we filed comments with the CAB, we were being asked to respond to some specific proposals that the CAB was considering at that time, and is still considering.

And we said, "If you are going to have rules in this area, we think that on short flights, on balance, there is something to be said for not going through the exercise of segregating passengers into smoking and nonsmoking and having the stewardess move around a little sign and that sort of thing."

But we also were very careful to caveat that and to say very clearly that, even though, to the extent the CAB was going to get into this matter, we thought on balance that made sense, we also said that they ought not to do that without taking into account the risk of forcing smokers back into the lavatories. And that we would hope that before they did anything, they would coordinate the timing on any such rule with the timing of the FAA's regulatory proceedings which are now underway with respect to fire alarms and extinguishers in the lavatories on planes.

Now again, that was a comment filed in a specific proceeding where we were asked to judge on the merits a number of competing proposals.

Once the CAB is out of business there are a lot of issues—this is one of them—where DOT for years has been filing comments and making judgments as to which is the better way to proceed if you're going to have a rule and where there will now no longer be any Federal regulations.

And so we certainly are comfortable with that basic notion, or not at all uncomfortable with the notion that, in this area, when that day comes we think we can get the kind of service that nonsmokers are now getting, but through the marketplace.

There are simply, in our judgment, too many people in this country to fly frequently who do not smoke for the carriers to give up that portion of the market. And if a carrier did that, I think common sense tells us that very quickly his competitors would do exceedingly well with the majority of passengers who are nonsmokers.

We don't see any major inconsistency at all.

Mr. PACKARD. Will the chairman yield on that?

Mr. MINETA. Surely.

Mr. PACKARD. If there were no regulations or no rule identifying specifically smoking and nonsmoking conditions, without the authority of such a rule, would this tend to induce further litigation in the defense of personal rights?

Mr. BURNLEY. Congressman, we are, in my judgment, even as an attorney, an unduly litigious society. I am not going to be so bold as to sit here and say that there would not be any litigation in that area. Somebody somewhere would sue, I am sure, on that, but I do not see that as a major risk. And the reason I would say that is, I would assume that that suit would probably have a very short life in any responsible court, because once the Federal regulations have disappeared and you leave it to the marketplace I do not know what the cause of action could be. Again, though, I do not know that you would have very many instances where even those looking for an opportunity to sue about something would be given that opportunity, because we just cannot imagine carriers giving up that huge chunk of the market, the passengers who wish to sit in areas where there is no smoking.

And if we are correct in our assumptions on that—and we think there is every reason to take that view—then I just do not see very many opportunities here even for those who specialize in vexatious litigation. It might happen once or twice, inevitably. I do not see that as a major risk.

Mr. PACKARD. Lacking the force and the strength of an official regulation or official law, a carrier would not have the authority to prohibit someone if they chose—even though they may recommend it as a carrier policy to prohibit someone from smoking in a nonsmoking area; is that correct?

Mr. BURNLEY. Oh, no, sir. I think, quite clearly, when you provide, through what is a quasi-contractual relationship—you sell a ticket to somebody to provide carriage—there are a number of things that a carrier can reasonably say to the passenger as to what you may or may not do on an airplane. We can all assume safely that they will require the passengers to wear clothing. They will require their passengers to not do unpleasant things in the aisles. There are a lot of areas where the airlines in the past have been able to take action regarding passengers who have not complied with the standards that they have set for the travelers they are carrying—without Federal regulation mandating that they do it. They have been able to control those problems.

I think that is the kind of precedent that gives us a good deal of hope that it would work very much the same way in the smoking area, if the carrier makes reasonable distinctions in seating areas. I think it is like controlling the things one can do in the aisles.

Mr. **Packard**. I think there are laws that would back the carrier up on wearing or not wearing clothing. But let's carry that a little bit further. There are not laws that would prescribe or give to a carrier the right to say that you cannot wear a sunsuit on an airplane, whereby they would say you have to wear a suit or you have to wear a certain kind of clothing.

I think the smoking atmosphere may fit into that where there is no law or regulation. Then if a person pursues it individually and says, "There is no law that says I cannot smoke in this particular part of the airplane if I choose to," would there be sufficient legal backing where an airline could enforce such a company policy?

Mr. **Burnley**. Our judgment is there would be because of the quasi-contractual relationship between the carrier and the passenger as a basis for that.

Mr. **Packard**. I thank the chairman for yielding.

Mr. **Mineta**. Also, under the present situation, the nonsmoker is at least guaranteed a seat, right?

Mr. **Burnley**. Yes, sir. That is true.

Mr. **Mineta**. Mr. Hammerschmidt.

Mr. **Hammerschmidt**. Thank you, Mr. Chairman.

Secretary Burnley, with the proliferation of new carriers under deregulation, don't you believe that continuation of the fitness function, as now performed by the CAB—and, you know, that involves financial fitness, managerial ability, compliance disposition, a whole four pages of requirements—don't you think that that would provide substantial consumer benefits which would not otherwise be provided by having FAA do it as part of its safety certification?

As I read the DOT proposal, a part of FAA's safety certification would be performed by air carrier inspectors and may not be nearly as comprehensive as what is required by CAB at the present time.

Mr. **Burnley**. There is no question. It will not be nearly as comprehensive. And I think the good news is precisely what you just referred to. Right now, you have four pages of regulations.

I know of no excuse, when the Congress has said that they want the Federal Government to get out of the economic regulatory business with the exception of very few residual functions, for the Department of Transportation to require would-be carriers to provide balance sheets. We have got safety responsibilities and some of the issues that are covered through the economic fitness process may be issues that we will get into through the safety process.

But on the whole, we think that exercise is one that the Congress very appropriately intended to bring to an end when it passed the sunset statute.

Now again, if you've got a problem with someone who is going to defraud the people they do business with, and most importantly the passengers, then one way or another, whether it is on our operation of law theory or on the view of the chairman—you have suggested today that you need a new statute and intend to enact one that gives the FTC explicit authority in this area—that is an issue the FTC under its consumer protection responsibilities would have domain over.

If you've got shady characters who want to get into the airline business, we think that, to the extent there is a question about them doing things with their bank accounts they should not do and laundering funds and that sort of thing, that is appropriately an issue that the Justice Department now has jurisdiction over through the Criminal Division.

Our responsibilities extend to the safety-related aspects as to the nonsubsidized domestic carriers, and that is where we intend to draw the line. So there is no question that we might get into a few paragraphs of those four pages, but we share the view we understood the Congress to be taking back in 1978 that most of those four pages ought to cease to be effective.

Mr. **HAMMERSCHMIDT**. As I understand your response then, you would not have any way of knowing about any criminal violation or civil violation history of an applicant at all.

Mr. **BURNLEY**. We would. Under present FAA practice, we do require that people who want to come in and get an FAA certificate to operate aircraft, that they tell us whether they have been in violation of aviation-related safety statutes or regulations. We would certainly consider that, and we consider that a very important exercise.

On the other hand, that is where we understand the Congress intended for us to draw the line, at the safety-related issues.

So if they are not responsible in their safety history, as in 1978—they have a record of violations of the requirements about what one does and does not do in an airplane—then we think we have a real role there, and we intend to be aggressive about enforcing it.

But if it is a question of whether or not one of the partners in a would-be carrier was convicted of a serious traffic offense 40 years ago, we do not think we have any business getting into that, and I do not think that the Congress intended us to get into issues of that sort.

Mr. **HAMMERSCHMIDT**. Mr. Secretary, as we have discussed here earlier this morning, DOT supports a transfer of CAB's antitrust authority for intercarrier agreements to the Justice Department, as provided for under existing law.

Nevertheless, many witnesses who will testify later at these hearings believe that the DOT has a much greater level of expertise in transportation, and that unlike the Justice Department, it would have no institutional biases resulting from the fact that it, the Justice Department, is the Nation's primary enforcement agency in antitrust matters.

Do you believe that that is a valid concern?

Mr. **BURNLEY**. Congressman, I believe that it is a genuinely felt concern in some quarters of the industry. As I think you know, the industry does not speak with one voice on this issue, and there are those carriers who view the Justice Department as an appropriate place for the jurisdiction to reside.

We do feel that on the whole the 1978 scheme makes sense. It is the case that we have a great deal of expertise on transportation-related issues. We have relatively less expertise on antitrust issues than the Justice Department. On the other hand, in the areas where we may have marked expertise, the Justice Department also has a very substantial record of involvement, most particularly the Antitrust Division. We work very closely with the Antitrust Division in coming to a position on behalf of the U.S. Government in international negotiations on aviation issues. The Justice Department routinely files comments, just as the Department of Transportation does, in CAB proceedings.

It is not as if we are the only folks in the executive branch with expertise in this area. We think the Antitrust Division does have some expertise in this area. We think they are probably better suited than we are to carry out the decisionmaking process on antitrust-related immunity issues.

But again, where there are proceedings of that sort—as noted in Assistant Attorney General McGrath's prepared testimony that he will deliver to you later today—we will have the opportunity to comment, and we will not be hesitant in making our views known on those occasions.

Mr. HAMMERSCHMIDT. Mr. Burnley, we appreciate your testimony, and I appreciate your very comprehensive responses.

Thank you, sir.

Mr. MINETA. Mr. Secretary, on both the smoking regulation and the handicapped access issue, the simple preservation of section 404 authority would not, of course, require you to do anything, if you felt that the marketplace could regulate smoking better than Government regulations. You could repeal those rules through the normal rulemaking process. But if you turned out to be wrong, you would still have the authority to regulate as necessary.

So isn't it better to have that kind of authority in case it is necessary to protect the public, rather than predict that it will not be necessary, believing in the infallibility of that prediction, and totally eliminate that authority and all possibility of regulation?

Mr. BURNLEY. Mr. Chairman, that is a risk that is no greater or less a risk than the Congress decided in 1978 to take across the board on economic regulatory matters concerning commercial aviation.

I do not know why we would single out the smoking area in particular.

I think as to the question of discrimination against the handicapped, that we very clearly are in a good position, as I have said before, because we already have regulations on the books.

To get to the question of federally assisted airports, we will continue to address any problems that we have in that area.

On smoking, I really do not know why that should be treated differently than the dozens of other issues where the Congress is willing to trust the forces of the marketplace. If it turns out that we are wrong and that there is a serious problem, I expect that the Congress would move quite expeditiously in the face of public pressure on that issue to correct it.

But in this exercise, we are trying to take the view—and we feel pretty strongly about it, as I think the committee realizes—that the old adage, "If it ain't broke, don't fix it," makes some sense. I would suggest that the better course of action on smoking would be to wait and see. I think there is a very high probability that the marketplace will be effective in this area. If there are significant problems, the Congress will still be available to address those, I am sure.

Mr. MINETA. Even if we were to give the Department the benefit of the doubt, it is at best a debatable point that if we had no bill, FTC would end up with section 5 authority over the airline industry. And I think GAO will make this point very well in their testimony later today as well.

Now the issues at stake are of considerable monetary value to some: limitations on baggage liability, regulation of the computer reservation system, and so on. Now each of these issues has someone somewhere to whom the demise of those regulations could be worth a very large amount of money.

In the absence of legislation, wouldn't such persons sue FTC, if it attempted to exercise that authority, and wouldn't a series of protracted court fights mean that even if your interpretation were ultimately upheld, the consumers and the carriers alike would go through years of not knowing what rules, if any, governed?

So wouldn't it be better for all concerned to legislatively specify that section 411 is, in fact, preserved and where, rather than just leaving this whole issue so uncertain?

Mr. BURNLEY. Mr. Chairman, we have not been hesitant to say that on the one hand by operation of law the matter will be resolved, and that there would not be an extended period of uncertainty, because we think that our reading of the law in this area is a correct one.

We have, however, at all times also said that we are not objecting if the Congress wishes to remove the few words in section 5(a) that are causing the concern. We do not feel it is necessary.

We think the process of CAB sunset will take care of this problem by operation of law, again. But we are not objecting to legislation in that area.

We, on the other hand, have not come to the Congress asking for legislation that we do not think is required in this area.

Mr. MINETA. Now for the consumer who wants to know where he or she stands on January 1, we not only have to specify that section 411 authority is preserved, but the whole existing body of consumer protection regulations based on section 411 needs to be preserved.

Your legal analysis does not address the question of how CAB rules and regulations based on section 411 authority would go to the Federal Trade Commission under section 5.

Is there some belief that that transfer of rules and regulations would somehow be automatic? If not, would FTC have to act positively to recreate them at FTC? And would the more cumbersome Magnuson-Moss procedures apply to that action? And have you looked specifically at how long such a procedure would take the FTC to accomplish?

Mr. BURNLEY. We have looked at that issue and the FTC has a somewhat more difficult task in doing that which DOJ and DOT plan to do, and that is enacting positive regulations to replace the CAB's regulations in the areas where we are assuming residual responsibilities.

We do feel, however, that during the pendency of the procedures under the Magnuson-Moss Act that the FTC, as it does in all consumer protection issues, has clear authority to handle specific problems on a case-by-case basis and they would be able to cover the transitional period effectively in that fashion.

Let me caveat everything I have said on that, however, by saying that we really do feel that is the kind of issue where the FTC ought to speak first and foremost. I am sure they have spent some time looking into this. It is my understanding that they have, on the assumption that either by operation of law or by the passage of legislation by the Congress they are going to have to address this problem.

Either way, even if you enact legislation, if you do not explicitly provide that the CAB's present rules go to them, they have got a problem and I understand that they have spent some time thinking about that.

I would like to caveat my answer by saying that, as we have done with DOJ in talking to them about how they propose to handle this particular kind of problem, that we would be most interested first and foremost in what the FTC thinks about their internal procedures on that.

Mr. MINETA. Mr. Secretary, thank you very much for spending this time with us. As Mr. Hammerschmidt says, your testimony has been illuminating and is very helpful to us.

Mr. BURNLEY. Thank you. I appreciate the chance to be here.

[The opinion of the General Counsel, Department of Transportation, follows:]

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OPINION OF THE GENERAL COUNSEL

IMPACT OF "SUNSET" ON CERTAIN CAB FUNCTIONS

This opinion examines Federal aviation and airline deregulation statutes to determine whether certain domestic air transportation functions of the Civil Aeronautics Board (CAB) — which are neither explicitly terminated nor listed for transfer by the "Sunset Provisions" enacted by Congress in 1978 -- nonetheless transfer to the Department of Transportation (DOT) or other agencies rather than cease when the CAB terminates.

In particular, this opinion is concerned with four major functions currently performed by the CAB: section 401(d) domestic carrier "fitness" certification; section 404(a) "safe and adequate" service regulation; section 407 and 415 data collection; and section 411 "unfair trade practices" regulation.

For the reasons that follow, I have concluded that none of these functions transfer to DOT or any other agency as a result of the sunset provisions. However, I have also concluded that DOT and the Federal Trade Commission (FTC) will have sufficient authority to perform almost all of these functions under their existing statutes, so that no additional legislation will be needed to continue these functions once the CAB terminates.

TITLE XVI DOES NOT TRANSFER THE FOUR DOMESTIC FUNCTIONS

The functions of the CAB are set out in the Federal Aviation Act of 1958 ("the Act")[1], as amended by the Airline Deregulation Act of 1978[2]. The sunset provisions, in Title XVI of the Act, provide for the progressive dismantling of the CAB and the functions it performs, commencing on October 24, 1978, and accelerating on December 31, 1981, and January 1, 1983. The process culminates on January 1, 1985, with the abolition of the CAB (by repeal of Title II of the Act) and the transfer of certain functions to other named agencies. See section 1601 of the Act.

International aspects of all CAB functions not abolished clearly transfer under section 1601(b)(1)(B) of the Act, and are not at issue in this opinion. The purely domestic aspect of certain other CAB functions contained in the Act are neither explicitly terminated nor transferred by Title XVI. Those domestic functions and the relevant statutory provisions are:

1/ Public Law 85-726, Aug. 23, 1958, as amended, 49 U.S.C. 1301 et seq.

2/ Public Law 95-504, October 24, 1978.

Fitness:

Section 401(d) of the Act provides, in part:

> "(1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder . . . . "

Safe and Adequate Service:

Section 404(a)(1) of the Act (though repealed in large measure in 1981 and 1983) provides, in part:

> "It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers authorized to engage in scheduled air transportation by certificate or by exemption under Section 416(b)(3) of this title; to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportation; and, in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers."

Data Collection:

Section 407 of the Act provides, in part:

> "(a) The Board is empowered to require annual . . . and special reports from any air carrier . . .; to prescribe the

> manner and form in which such reports shall be made; and to require from any air carrier . . . specific answers to all questions upon which the Board may deem information to be necessary . . . ."

Section 415 of the Act provides, in part:

> ". . . the Board is empowered to inquire into the management of the business of any air carrier and . . . to obtain from such carrier . . . full and complete reports and other information."

Unfair Trade Practices:

Section 411 of the Act provides, in part:

> "The Board may, upon its own initiative or upon complaint of any air carrier . . . investigate and determine whether any air carrier . . . has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find . . . that such air carrier . . . is engaged in such unfair or deceptive practices, or unfair methods of competition, it shall order such air carrier . . . to cease and desist from such practices or methods of competition."

Based on established principles of statutory construction, it is my opinion that none of the domestic functions contained in sections 401(d), 407, 411, and 415 survive the termination of the CAB. The Act explicitly states that the CAB is empowered to perform these functions. Title XVI of the Act abolishes the CAB, and no other agency has been assigned the authority to perform these functions in addition to or in place of the CAB.

Administrative agencies may exercise only such powers as are conferred on them, explicitly or implicitly, by positive law. See 3 Sands, Sutherland Statutory Construction, sections 65.01 and 65.02, and the cases collected therein. Since there is no legislation designating a body to succeed the

CAB, nor even any legislative history to indicate a successor agency, it cannot follow that Congress intended to transfer the purely domestic aspects of the functions contained in sections 401(d), 407, 411, and 415 of the Act to an undesignated body. These functions thus lapse. For similar reasons, the underlying requirement of section 401(a) that an air carrier must be in possession of a certificate issued by the CAB also lapses with respect to carriers engaged solely in domestic air transportation. 3/

It is only somewhat less clear whether the "safe and adequate" provisions of section 404(a) of the Act cease upon the termination of the CAB. Section 404(a)(1) provides, in part, that "It shall be the duty of every air carrier . . . to provide safe and adequate service, equipment, and facilities" in connection with air transportation authorized by its certificate. It thus might be argued that domestic air carriers retain the obligation to provide such safe and adequate service even after the termination of the CAB.

3/ Section 401(a) provides: "No carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation." Although it might be argued that the termination of the CAB does not affect the requirement of section 401(a) that an air carrier must possess a section 401 certificate, such a position would lead to the absurd result of absolutely curtailing any new entrants after the CAB's termination in 1985. Such a result would be contrary to the Congressional purpose of the Airline Deregulation Act, which was to accelerate new entry and expand service. Action on Smoking and Health v. CAB, 699 F. 2d 1209, 1214-15 (D.C. Cir. 1983). See also section 102(a)(10) of the Act.

However, such an argument ignores the fact that the section 404(a) duty is an obligation conditioned on the holding of a section 401 certificate. Although section 1601(a)(2)(B) of the sunset provisions explicitly preserves the "safe and adequate" service requirement at least from January 1983 to January 1985, there is no clear indication in either the Act or its legislative history that Congress intended the section 404(a) obligation to survive the lapsing of the underlying requirement that air carriers be certificated. Even without section 404(a), however, other provisions of the Act -- which are enforced by the FAA and continue in force — serve to guarantee the "safety" of domestic air transportation.

Even if one were to assume, arguendo, that section 404(a) survives the lapse of the requirement for a section 401 certificate upon the termination of the CAB, there still would be no way to enforce the general duty expressed in section 404(a). No agency would be empowered to interpret or enforce the statutory duty or any of the CAB's implementing regulations. One court has already decided that Congress did not intend to create a private right of action to enforce section 404(a). Diefenthal v. CAB, 681 F.2d 1039, 1050 (5th Cir. 1982).

In addition, it might be argued that section 47 of the Airline Deregulation Act of 1978 preserves consumer regulations issued under section 404(a) of the Act. [4/] However, I believe the better view is that section 47 was intended only to preserve CAB regulations and other proceedings during the deregulatory transition period begun in 1978, but not beyond sunset. See S. Rep. 95-631, February 6, 1978, at 112.

It would be unreasonable to conclude that Congress intended to freeze into perpetual effect all the CAB's regulations, orders, and determinations -- most of which will become irrelevant, incapable of application, and unenforceable as to domestic operations — upon the termination of the CAB. Furthermore, such a literalistic reading of section 47 would have the anomalous effect of preserving regulations in effect on October 24, 1978, but not if they were subsequently modified by the CAB. For these reasons, it is reasonable to regard the statutory termination of the CAB as the "operation of law" specified in section 47 that serves to repeal the Board's regulations, including those promulgated under section 404(a).

[4/] Section 47 provides, in pertinent part:

"All orders, determinations, rules, regulations, permits, contracts, certificates, rates, and privileges which have been issued . . . by . . . the Civil Aeronautics Board . . . and which are in effect at the time this Act takes effect, shall continue in effect according to their terms until modified . . . or repealed by the Board . . . or by operation of law."

For these reasons, I conclude that the "safe and adequate" duty of section 404(a) of the Act lapses, or is at least rendered unenforceable, upon the termination of the CAB.

II. DOT AND FTC HAVE SUFFICIENT EXISTING AUTHORITY TO PERFORM FUNCTIONS NOW CARRIED OUT BY CAB

Although Title XVI of the Act itself does not transfer authority for the four domestic transportation functions discussed above to DOT or FTC, these agencies have sufficient existing statutory authority to perform virtually all of those duties currently carried out by the CAB. In general, the FTC would carry out the consumer protection duties, and DOT would carry out the fitness and data collection responsibilities.

A. Sections 411 and 404(a).

The FTC is empowered "to prevent persons, partnerships, or corporations . . . except . . . air carriers and foreign air carriers subject to the Federal Aviation Act of 1958 . . . from using unfair or deceptive acts or practices in or affecting commerce." Section 5(a) of the FTC Act, as amended, 15 U.S.C. 45(a). When the CAB is terminated, air carriers involved in purely domestic transportation will no longer be subject to section 411 of the Act, which empowers the CAB to prevent unfair or deceptive practices or unfair methods of competition by an air carrier, foreign air carrier, or ticket agent. Although the air carriers will literally remain subject to the Act, the Congressional rationale for the exception to section 5(a) of the FTC Act will cease upon the CAB's sunset, for reasons discussed below. Thus, it is my opinion that the FTC will re-acquire its authority to regulate unfair trade practices of domestic air carriers under section 5(a).

The air carrier exception to section 5(a) was first enacted in 1938, when Congress established the Civil Aeronautics Authority (CAA), the predecessor of the CAB. [5] Congress vested the FTC's authority with respect to air carriers in the CAA because it concluded "that for the present the most efficient and advantageous regulation . . . could be secured by the coordination of all governmental functions relating to civil aeronautics in a newly created independent agency" (emphasis added). H. Rep. 75-2254 at 4, April 28, 1938. Congress believed that a single aeronautical agency was needed at that stage to avoid "inefficiency and duplication of effort." Id.

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[5] Civil Aeronautics Act of 1938, June 23, 1938, ch. 601, section 1107(f).

Over the next forty years, Congress renamed the agencies responsible for economic regulation of domestic aviation, but the FTC exemption remained intact. [6/]

Faced with a mature industry in 1978, Congress decided to terminate most of the CAB's economic regulatory functions with respect to air carriers involved in domestic transportation. With the scheduled 1985 termination of the CAB as an independent agency to oversee the domestic airline industry, the entire rationale for divesting the FTC of its section 5(a) authority over domestic air carriers will dissipate. At that point, there will no longer be a congressional intention to consolidate all governmental functions, or even all economic functions, in a single aviation agency to avoid inefficiency and duplication, because that "single agency" will no longer exist.

[6/] In 1940, some of the safety functions under the Civil Aeronautics Act were vested in the Administrator of Civil Aeronautics and the remaining safety and economic functions were vested in the CAB. Reorganization Plan No. III, section 7, April 2, 1940, and Reorganization Plan No. IV, section 7, April 11, 1940. The Federal Aviation Act of 1958 replaced the 1938 statute, and further split the functions of the CAB into two parts -- transferring the safety functions to the new Federal Aviation Administration and retaining the economic functions in the CAB. As a technical matter, Congress also amended section 5(a) of the FTC Act to reflect the 1958 enactment. See section 1411 of the Act, P. L. 85-726.

I do note that air carriers will continue to be subject to FAA safety regulation under the Act (see Title VI) after the CAB is terminated. Thus, it might be argued, as a technical matter, that Congress intended the FTC to be divested of its section 5(a) authority so long as air carriers were in any way subject to the Act. However, such a strained, literal reading of section 5(a) of the FTC Act is not justified. While the starting point for the construction of a statute is the language of the statute itself, an overly literal reading of the statute may be avoided when such a reading would "thwart the obvious purpose" of the statute. Helvering v. Hammel, 311 U. S. 504, 511 (1941). See also 2A Sands, Sutherland Statutory Construction, sections 45.09, 45.12, and 54.06.

In this case, a literal reading of the FTC Act exception would lead to the unreasonable and unfounded conclusion that Congress intended to insulate air carriers from FTC jurisdiction over unfair and deceptive practices merely because they are subject to the FAA aviation safety authority. Such a reading of the section 5(a) exception would be manifestly inconsistent with its purpose, which was to prevent duplication of functions by the FTC and the single aviation agency. Although Congress deregulated domestic air carriers in 1978 as to route and rate authority to make them more competitive, there is no evidence that Congress intended to permit unfair or deceptive competition in the process. Indeed, Congress, at that time, explicitly stated its policy of preventing "unfair, deceptive, predatory, or anti-competitive practices in air transportation, . . ." See section 102(a)(7) of the Act, as added by the Airline Deregulation Act.

Almost all of the CAB's consumer regulations are based on the joint authority of sections 404(a) and 411 of the Act. Thus, it is my view that the FTC will be able, under its own section 5(a) authority, to regulate air carriers involved in domestic transportation in all areas currently regulated by the CAB under its section 411 authority, such as unfair advertising, oversales (or overbooking), notices of terms of contract carriage, domestic baggage liability, bonding and escrow for charter operators, and the current rulemaking regarding computer reservation systems.

B. Section 401.

Under section 401(d) of the Act, the CAB is required to determine if an air carrier is "fit, willing, and able" to perform its responsibilities. These certifications involve a mix of financial and safety considerations, with the CAB relying on the FAA for safety findings under current practice. As noted earlier (supra, at p. 3, and fn. 2), with the termination of the CAB and the failure to transfer domestic certification authority elsewhere, the requirement for domestic new entrants to obtain a section 401 certificate, and the prohibition against operating without one, both lapse.

A complete and meaningful review of carrier fitness can nonetheless be carried out by the FAA in judging a carrier's potential and continued safe operation in order to issue an operating certificate under section 604 of the Act, including financial and managerial matters to the extent that they have a bearing on aviation safety. Section 604 empowers the FAA to issue operating certificates, based on an investigation of whether the air carrier is properly and adequately equipped and able to conduct safe operations in accordance with FAA safety standards.

The abolition of the section 401(a) requirement for CAB domestic fitness certificates might be argued to pose several other issues besides that of carrier fitness. The Act provides that Federal pre-emption of the states' economic regulation of air carriers depends on the carriers' "having authority under Title IV of this Act to provide interstate air transportation." Section 105(a)(1) of the Act. If this language were narrowly interpreted to mean "having a 401 certificate to engage in air transportation," air carriers involved only in domestic transportation would not qualify for protection from state and local economic regulation. This narrow approach has already been rejected in Hughes Air Corp. v. Public Utilities Commission of the State of California, 644 F. 2d 1334, 1337 (9th Cir. 1981) (rejecting the argument that section 105(a)(1) "applies only to carriers who have been granted authority to operate by CAB certification," and holding that an exemption from the 401 requirement by the CAB under section 416 qualified an air carrier for the benefits of preemption).

A more reasonable meaning for the phrase "having authority under Title IV" requires a broader reading consistent with Congress' intent in 1978 that domestic air carriers — which had been historically regulated in great detail by the CAB under Title IV of the Act --would henceforth be regulated by market competition, and subject to government regulation only in specific instances, (e.g., postal matters, agreements immunity) by the remaining authority of Title IV. By passing the Airline Deregulation Act, which enacted the preemption rule of section 105(a)(1), Congress intended to make a fundamental change in the "direction and policy of aviation regulation" by providing for a "gradual and phased transition to a deregulated system." H. Rep. 95-1779 at 56. Having made extensive and systematic reductions in Title IV economic regulation of domestic air carriers, and having simultaneously enacted a preemption provision to prevent states from regulating or re-regulating the same areas, Congress could not have intended the deregulated Federal environment of interstate air carriage to be replaced at the CAB's sunset by a patchwork quilt of state regulation, prescribed and enforced by 50 mini-CAB's. Thus, it is my opinion that section 105(a)(1) of the Act will provide for Federal preemption of economic regulation to the same degree after sunset as it does currently.

In another area, the abolition of the section 401(a) certificate might pose an issue with respect to certain authority of the FAA to regulate airport security. The FAA's authority under the Act to grant exemptions from rules on the screening of passengers, (section 315(b)), promulgate rules for the protection of passengers and property from criminal violence (section 316(b)), grant exemptions for airport security in Alaska (section 317), and exempt commercial aircraft from a requirement for emergency locator equipment (section 601(d)(2)(B)) are all established by reference to "air carriers certificated by the Board" or by similar language.

In enacting the Title XVI sunset provisions, Congress did not intend to deregulate the authority of the FAA in any respect. Congress stated, in section 107(a) of the Act, that it "intends the Airline Deregulation Act of 1978 (to) result in no diminution of the high standard of safety in air transportation attained in the United States at the time of the enactment of such Act." It also directed the Secretary to "take those steps necessary to ensure" that safety standards are maintained. section 107(b). See also section 102(a) of the Act. Moreover, the FAA has continuing broad authority to prescribe rules "necessary to provide adequately for national security and safety in air commerce" under section 601(a)(6) of the Act. I believe Congress intended for the FAA to have continued authority with respect to air carriers that, prior to sunset, were certificated or would have been subject to the certification requirement under the Act, and with respect to airports served by these carriers.

C. Sections 407 and 415.

The CAB is authorized to collect information from air carriers and to require the submission of reports regarding management, accounts, and stock ownership under sections 407 and 415 of the Act. This authority, with respect to domestic air carriers, will cease when the CAB terminates.

Nonetheless, DOT will still have adequate authority to collect information, relevant to the government's interest in aviation, because of the Secretary's independent authority under both the Act and the DOT Act.

The DOT Act, as recently codified in 49 U.S.C. 301, provides in part that the Secretary shall:

> "(3) promote and undertake the development, collection, and dissemination of technological, statistical, economic, and other information relevant to domestic and international transportation . . . ."

More specifically, the DOT Act also empowers the Secretary to "collect and collate transportation information the Secretary decides will contribute to the improvement of the transportation system of the United States." 49 U.S.C. 329(a). The codification also continues the Secretary's long-standing authority, previously set out in section 311 of the Act, to collect and disseminate information on civil aeronautics not collected by the CAB. 49 U.S.C. 329(b)(1). Termination of the CAB will effectively eliminate this exclusion, thus giving DOT and FAA broad latitude in assembling necessary aviation data.

These data collection functions can be enforced under section 902(e) of the Act which provides in part:

> "Any air carrier . . . who shall knowingly and willfully, fail or refuse to make a report to the . . . Secretary of Transportation as required by this Act, or to keep or preserve accounts, records, and memoranda in the form and manner prescribed or approved . . . shall be deemed guilty of a misdemeanor . . . ."

Together, these authorities will permit continued collection of all data necessary to carry out DOT's responsibilities under the Act.

CONCLUSION

For the reasons set forth above, I have concluded that the domestic functions of the CAB under sections 401(d), 404(a), 407, 415 and 411 of the Act are effectively extinguished and do not transfer to any other agency upon termination of the Board. I have also concluded that DOT and FTC have sufficient authority under their existing statutes to perform virtually all of those domestic functions following CAB sunset, so that no new legislation is needed.

/s/ Rosalind A. Knapp
Deputy General Counsel

Dated: January 26, 1984

Mr. MINETA. I am pleased now to call on the Honorable George W. Douglas, Commissioner of the Federal Trade Commission.

Mr. Douglas, the full text of your prepared statement will appear in the record at this point.

[Statement referred to follows:]

STATEMENT OF GEORGE W. DOUGLAS, COMMISSIONER, FEDERAL TRADE COMMISSION

Mr. Chairman and Members of the Subcommittee: I appreciate this opportunity to appear before you today. I am appearing on behalf of the Federal Trade Commission (FTC) to express the Commission's views on whether legislation is needed to ensure continued protection for consumers of air transportation, given the impending sunset of the CAB.

I am especially pleased to be here because airline regulatory reform has long been of deep interest both to me and to Chairman Miller, with whom I collaborated in a book on the effects of economic regulation of domestic airlines.[1]

The Commission has not just been a passive observer of the dramatic changes taking place in the regulation of airlines. Since 1978, for example, the Commission's staff has intervened in several important rulemakings before the CAB.[2] Most recently, the Bureaus of the FTC filed comments in a CAB proceeding examining the operation of computer reservation systems. And while air carriers are excluded from FTC jurisdication because of an exemption in the Federal Trade Commission Act (FTC Act), we still maintain expertise in airline matters. An example of this is a recent study by two of our economics on airport slot allocation.[3] The Commissioners' continuing interest in maintaining a sound airline system can be seen in such matters as Chairman Miller's testimony on behalf of the Commission on H.R. 2053, the proposed "Air Travelers Security Act of 1983," [4] concerning the CAB's competitive marketing decision.

FTC JURISDICTION OVER AIR CARRIERS FOLLOWING CAB SUNSET

My principal reason for being here today is to discuss what role, if any, the FTC would have in the consumer protection area following CAB sunset.

At the outset let me make clear that, absent further legislation, the FTC would be precluded from exercising any unfairness or deception authority over air carriers. That is because of an exception written into Section 5 of the FTC Act for "air carriers and foreign air carriers subject to the Federal Aviation Act of 1958." One simply cannot infer that Congress intended the FTC to take over the consumer protection role for this industry. Here, I would also note that the same problem applies to the Commission's jurisdiction over "unfair methods of competition" in the airline industry. However, the Department of Justice would have antitrust jurisdiction, so at least there would be no antitrust jurisdictional gap on the Federal level.

THE FTC POSITION ON THE NEED FOR A FEDERAL AGENCY TO HAVE CONSUMER PROTECTION JURISDICTION

The Commission strongly believes that an agency of the Federal Government should have the authority and capability to protect consumers in the purchase of air transportation. The purchase of air transportation is not an insignificant transaction for the consumer, and it deserves the same amount of consumer regulatory oversight as other consumer transactions have generally.

What is the value of regulatory oversight? First, the mere presence of jurisdiction has some deterrent value. Second, the legislative machinery may act too slowly for emergency situations that, while of immediate concern to those consumers affected, may not be of sufficient magnitude to move Congress to divert its attention from more pressing matters. If some pattern of unfairness or deception were discovered—and here the overseas strandings experienced by some charter passengers several years ago come to mind—it would be logical and preferable for an agency with the greatest consumer protection experience and power to be able to halt the practice quickly through prompt law enforcement action.

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[1] George W. Douglas and James C. Miller III, "Economic Regulation of Domestic Air Transport: Theory and Policy" (Washington: The Brookings Institution, 1974).

[2] Subjects included consumer protection rules for charter participants and scheduled-service tour groups, competition as a determinant of domestic passenger fares, and entry liberalization.

[3] Donald Koran and Jonathan D. Ogur, "Airport Access Problems: Lessons Learned from Slot Regulation by the FAA: An Economic Policy Analysis" (Washington: Federal Trade Commission, 1983).

[4] Statement of James C. Miller III, Chairman, Federal Trade Commission, Before the Subcommittee on Aviation, Committee on Public Works and Transportation, July 26, 1983.

THE FTC POSITION ON ACQUIRING CONSUMER PROTECTION AUTHORITY OVER AIRLINES

Should Congress transfer the CAB's consumer protection jurisdiction to the FTC? We recognize that the Administration supports the FTC having this function,[5] and we would be happy to receive this authority if Congress should so decide.

One of the contributions I can make here today is to provide this Subcommittee with information with which to make a more informed judgment on whether the FTC is equipped to handle such a mission.

Let me begin by stating that the FTC has considerable expertise in regulating unfair or deceptive acts or practices for a wide variety of industries. Moreover, there is nothing sufficiently unique about the airline industry that would preclude our handling consumer protection matters based on our general expertise.

The CAB's Section 411 authority is based on Section 5 of the FTC Act, and, not surprisingly, the historical and textual origins of Section 411 have produced CAB enforcement standards that are largely identical to those existing under Section 5 of the FTC Act.[6] The experience of the Board and the courts with Section 411 has confirmed that the FTC's general principles of consumer unfairness and deception are also appropriate for the airline industry.

The FTC is also a logical repository for institutional reasons. We have a variety of enforcement mechanisms in place. Our professional staff is well versed in obtaining such relief as injunctions, cease and desist orders, and civil penalties.

The FTC can issue trade rules where relief in individual cases is not a sufficient remedy. Remedies for violations of our trade rules include rescission or reformation of contracts, refunds and return of property, as well as payment of damages and civil penalties. Thus, the FTC has a variety of practical relief available to protect the consumer.

Moreover, the FTC has, in addition to its legal staff, consumer specialists based throughout our ten regional offices. These specialists receive complaints and either provide direct assistance or facilitate resolution of the problem through other parties. Our field staff could readily add these responsibilities to its workload.

In sum, the FTC is a logical repository of the consumer protection function, and this new mission could be carried out with only incremental additions to our staff. Thus, it would not be necessary to set up entirely new offices. Most certainly, placement of consumer protection jurisdiction with the Commission would be consistent with the philosophy behind the Airline Deregulation Act—that the airline industry does not need special protection and should be treated no differently than any other industry. However, should another agency be delegated this responsibility, we would be glad to assist them in whatever way we can.

THE CAB'S CONSUMER PROTECTION RULES

Separate and distinct from the transfer of the CAB's consumer protection jurisdiction is the additional question as to the disposition of the consumer protection rules that the CAB has promulgated over the years.[7] We believe that absent further legislation, the CAB's consumer protection rules will lapse because Section 47 of the Airline Deregulation Act "saved" the CAB regulations only for the deregulatory transition period begun in 1978, but not beyond sunset.[8] Moreover, no other agency was explicitly empowered by the Airline Deregulation Act to administer the consumer function.

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[5] Statement of Secretary Elizabeth H. Dole, Department of Transportation, before the Subcommittee on Aviation, Committee on Public Works and Transportation, Feb. 29, 1984.

[6] See, e.g., *Pan American World Airways* v. *U.S.*, 371 U.S. 296, 303 (1963); *American Airlines* v. *North American Airlines*, 35 U.S. 79, 82 (1956); *Aloha Airlines* v. *CAB*, 598 F.2d 250, 258 (D.C. Cir. 1979).

[7] Commissioners Pertschuk and Bailey believe that legislation is required to ensure that existing CAB consumer protection rules are transferred to the FTC without lapse, and that such rules should be required to stay in effect without change for a reasonable time.

[8] Section 47 provides, in pertinent part: "All orders, determinations, rules, regulations * * * which have been issued * * * by * * * the Civil Aeronautics Board * * * and which are in effect at the time this Act takes effect, shall continue in effect according to their terms until modified * * * or repealed by the Board * * * or by operation of law." DOT believes that it is reasonable to conclude that the statutory termination of the CAB is the "operation of law" specified in section 47. Savings provisions frequently are quite explicit about such transfers; cf. section 12 of the Department of Transportation Act of 1966 (creating DOT and transferring existing regulations to DOT for enforcement), Pub. L. 89-760, 80 Stat. 931 § 12 (1966).

We believe that it is important to direct Congress' attention to an additional problem that should be considered before granting the FTC jurisdiction over the CAB rules. If the FTC were to receive the CAB's consumer protection rules, it may be necessary to modify or strengthen the rules at some point. The airline industry is, as you know, particularly dynamic, especially in the area of marketing practices. Such issues as the operation of computer reservations systems by airlines have become an issue of concern only in the last year or so. Also, the final phase out of the CAB may require some unanticipated last minute modifications to the regulations. The Commission's rulemaking and rule modification procedures generally are governed by the Magnuson-Moss Act. While these procedures are suitable for situations where we have been monitoring an industry for some time, the question is raised as to whether these procedures would be too cumbersome in the CAB context.

In making rule modifications, the legal question arises whether we would have to follow full blown Magnuson-Moss procedures—which may take several years to complete—or the less formal rulemaking procedures under Section 553 of the Administrative Procedures Act, which currently govern modifications of the rules by the CAB. The FTC Act is not clear on this subject. It is only clear that substantive amendments to rules promulgated by the FTC respecting unfair or deceptive acts or practices require Magnuson-Moss treatment.[9] Nowhere does the law clearly state what is to be done when amending rules transferred from another agency.

ANTITRUST JURISDICTION

Finally, if Congress merely removes the air carrier exemption to Section 5, it would also be giving the FTC authority over unfair methods of competition in this industry. This would not conflict with the Airline Deregulation Act's transfer to the Department of Justice of authority over merger approval, interlocking relationships, and agreements.[10] While Justice would have primary responsibility over antitrust matters in the airline industry, it would be possible that some antitrust cases might be cleared to the Commission. We foresee no special problems in this dual function, which is carried out on a satisfactory basis for all other industries. We support the idea that Justice is the appropriate place for the remaining antitrust functions once conducted by the CAB.

I would be happy to answer any questions at this time. Please bear in mind that at this point I will be speaking for myself unless I indicate otherwise.

Mr. **Mineta**. Please proceed.

TESTIMONY OF HON. GEORGE W. DOUGLAS, COMMISSIONER, FEDERAL TRADE COMMISSION

Mr. **Douglas**. Good morning. Thank you, Mr. Chairman, and members of the subcommittee.

I appreciate this opportunity to appear before you today. I am appearing on behalf of the Federal Trade Commission to express the Commission's views on whether legislation is needed to insure continued protection for consumers of air transportation given the impending Sunset of the CAB.

I am especially pleased to be here because airline regulatory reform has long been of deep interest, both to me and to Chairman Miller, with whom I collaborated in a book on the effects of economic regulation on domestic airlines.

The Commission has not just been a passive observer of the dramatic changes taking place in the regulation of airlines. Since

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[9] FTC Act, § 18(d)(2)(B) (Substantive amendments to rules promulgated under § 18(a)(1)); Magnuson-Moss—FTC Improvements Act, § 202(c) (FTC rules promulgated prior to Magnuson-Moss). These requirements do not apply to "interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices * * *." FTC Act, § 18(a)(1)(A).

[10] A description of the responsibility of the Department of Justice under the Airline Deregulation Act is contained in the DOT Plan, supra, pp. 37–38.

1978, for example, the Commission staff has intervened in several important rulemakings before the CAB.

The Commission's continuing interest in maintaining sound airline systems can be seen in such recent testimony also of the Commission before Congress.

My principal reason for being here today is to discuss what role, if any, the FTC would have in the consumer protection area following CAB sunset.

At the outset, let me make clear that, absent further legislation, the FTC would be precluded from exercising any unfairness or deception authority over air carriers. That is because of an exception written into section 5 of the FTC Act for "air carriers and foreign air carriers subject to the Federal Aviation Act of 1958." One simply cannot infer that Congress intended the FTC to take over the consumer protection role for this industry.

Here I would also note that the same problem applies to the Commission's jurisdiction over "unfair methods of competition" in the airline industry. However, the Department of Justice would have antitrust jurisdiction, so at least there would be no antitrust jurisdictional gap on the Federal level.

The Commission strongly believes that an agency of the Federal Government should have the authority and capability to protect consumers in the purchase of air transportation.

The purchase of air transportation is not an insignificant transaction for the consumer, and it deserves the same amount of consumer regulatory oversight as other consumer transactions generally.

What is the value of regulatory oversight?

First, the mere presence of jurisdiction has some deterrent value.

Second, the legislative machinery may act too slowly for emergency situations that, while of immediate concern to those consumers affected, may not be of sufficient magnitude to move Congress to divert its attention from more pressing matters.

If some pattern of unfairness or deception were discovered, and here the overseas strandings experienced by some charter passengers several years ago comes to mind, it would be logical and preferable for an agency with the greatest consumer protection experience and power to be able to halt the practice quickly through prompt law enforcement action.

Should Congress transfer the CAB's consumer protection jurisdiction to the FTC? We recognize that the administration supports the FTC having this function and we would be happy to receive this authority if Congress should so decide.

One of the contributions I can make here today is to provide this subcommittee with information with which to make a more informed judgment on whether the FTC is equipped to handle such a mission.

Let me begin by stating that the FTC has considerable expertise in regulating unfair and deceptive acts or practices for a wide variety of industries. There is nothing unique about the airline industry that would preclude our handling consumer protection matters based on our general expertise.

The CAB's section 411 authority is based on section 5 of the FTC Act, and, not surprisingly, the historical and textual origins of section 411 have produced CAB enforcement standards that are largely identical to those existing under section 5 of the FTC Act.

The experience of the Board and the courts with section 411 has confirmed that the FTC's general principles of consumer unfairness and deception are also appropriate for the airline industry.

The FTC is also a logical repository for institutional reasons. We have a variety of enforcement mechanisms in place. Our professional staff is well-versed in obtaining such relief as injunctions, cease-and-desist orders, and civil penalties.

The FTC can issue trade rules where relief in individual cases is not a sufficient remedy. Remedies for violations of our trade rules include rescission or reformation of contracts, refunds and return of property, as well as payment of damages and civil penalties. Thus, the FTC has a variety of practical relief available to protect the consumer. Moreover, the FTC has, in addition to its legal staff, consumer specialists based throughout our 10 regional offices.

In sum, the FTC is a logical repository of the consumer protection function, and this new mission could be carried out with only incremental additions to our staff. Thus, it would not be necessarily to set up entirely new offices. Most certainly, placement of consumer protection jurisdiction with the Commission would be consistent with the philosophy behind the Airline Deregulation Act that the airline industry does not need special protection and should be treated no differently than any other industry.

However, should another agency be delegated this responsibility, we would be glad to assist them in whatever way we can.

Separate and distinct from the transfer of the CAB's consumer protection jurisdiction is the additional question as to the disposition of the consumer protection rules that the CAB has promulgated over the years.

We believe that absent further legislation, the CAB's consumer protection rules will lapse because section 47 of the Airline Deregulation Act saved the CAB regulations only for the deregulatory transition period begun in 1978, but not beyond sunset.

Moreover, no other agency was explicitly empowered by the Airline Deregulation Act to administer the consumer function.

We believe that it is important to direct Congress attention to an additional problem that should be considered before granting the FTC jurisdiction over the CAB rules.

If the FTC were to recieve the CAB's consumer protection rules, it may be necessary to modify or strengthen the rules at some point. The airline industry is, as you know, particularly dynamic, especially in the area of marketing practices. Such issues as the operation of computer reservations systems by airlines have become an issue of concern only in the last year or so. Also, the final phaseout of the CAB may require some unanticipated last-minute modifications to the regulations.

The Commission's rulemaking and rule modification procedures generally are governed by the Magnuson-Moss Act. While these procedures are suitable for situations where we have been monitoring an industry for some time, the question is raised as to whether these procedures would be too cumbersome and time consuming in the CAB context.

In making rule modifications, the legal question arises whether we would have to follow full-blown Magnuson-Moss procedures, which may take several years to complete, or the less formal rulemaking procedures under section 553 of the Administrative Procedures Act, which currently govern modifications of the rules by the CAB.

The FTC Act is not clear on their subject. It is only clear that substantive amendments to rules promulgated by the FTC respecting unfair or deceptive acts or practices require Magnuson-Moss treatment.

Nowhere does the law clearly state what is to be done when amending rules transferred from another agency.

Finally, if Congress merely removes the exception to section 5, it would also be giving the FTC authority over unfair methods of competition in this industry. This would not conflict with the Airline Deregulation Act's transfer to the Department of Justice of authority over merger approval, interlocking relationships, and intercarrier agreements.

While Justice would have primary responsibility over antitrust matters in the airline industry, it would be possible that some antitrust cases might be cleared to the Commission. We foresee no special problems in this dual function, which is carried out on a satisfactory basis for all other industries. We support the idea that Justice is the appropriate place for the remaining antitrust functions onced conducted by the CAB.

Mr. Chairman, this concludes my prepared statement. I would be happy to answer any questions.

Mr. MINETA. Thank you, Commissioner Douglas.

First of all, I would like to refer back to Secretary Burnley's testimony, in which he referred to a legal memorandum prepared by the General Counsel of the Federal Trade Commission.

Could you please submit that?

Mr. DOUGLAS. We would be happy to.

[The confidential memorandum was received and has been retained in the subcommittee file.]

Mr. MINETA. In your prepared statement, you state, in unequivocal terms, that absent legislation, lifting the section 5 exemption from FTC authority for the airline industry, the FTC would not have any consumer protection authority over the airline industry despite DOT's contrary conclusion.

Is that correct?

Mr. DOUGLAS. That is correct.

We have looked at this matter very closely, and, as our general counsel has stated at some length, that is our conclusion.

Obviously, any legal conclusion is subject to some doubt. But we feel strongly that the language in the statute is plain.

Mr. MINETA. Is there anything you have heard here this morning that maybe dissuades you from that position of the legal counsel of FTC?

Mr. DOUGLAS. No, sir.

Mr. MINETA. Was FTC's view on this key point solicited by DOT before DOT took the issue to the Cabinet Council in December?

Mr. DOUGLAS. I really cannot answer that question. I was not in a position of dealing with this matter at that time.

Mr. **Mineta**. Do you think that the FTC's views should have been something solicited by DOT based on the fact that it could be considered relevant and useful——

Mr. **Douglas**. I would think so.

Mr. **Mineta** [continuing]. To the Cabinet Council if the issue came up?

Mr. **Douglas**. I would think so, yes.

Mr. **Mineta**. If there is, as DOT proposed, no legislation relating to CAB sunset, and since FTC takes the position that under such circumstances it would not have any consumer protection authority, is it accurate to say that FTC would not after January 1 begin providing consumer protection for airline passengers?

Mr. **Douglas**. If there were no legislative change at all, including no removal of the exception in section 5, I would think that we would be precluded from taking enforcement action on that behalf.

I would think that were we to now adopt the theory espoused by DOT, given that we have already testified to the contrary, we would not stand a very good chance in court.

Mr. **Mineta**. Then it is accurate to say that one of the consequences of DOT's proposals is that beginning on January 1, 1985 there will be no consumer protection regulations or authority for airline passengers?

Mr. **Douglas**. That is probably correct, yes.

Mr. **Mineta**. No section 404, no section 411, no section 5, no regulations based on any of those sections, so all existing consumer protections would be gone?

Mr. **Douglas**. That would be our understanding, at least as regards enforcement of the statutes by the Federal Trade Commission.

Mr. **Mineta**. On page 3 of your testimony you also support the idea that legislation is specifically needed to preserve existing consumer protection authority and that such authority should be preserved. Is that correct?

Mr. **Douglas**. That is correct. I think it would be possible for us to enforce, to some degree, the section 411 rules. If the exception in section 5 were removed, but without an affirmative transferral, it would be rather clumsy. We could promulgate an enforcement protocol and enforce it on an individual case-by-case basis in the interim. And then after we had built up a sufficient record of these cases, we could then enforce it under our authority under section 5(m)(1)(b).

Mr. **Mineta**. What about section 404?

Mr. **Douglas**. Section 404 would present more difficult problems for us, because it is not really worded in an unfairness context. Our basic authority, under section 5 of the FTC Act, is basically related to deception and unfairness. My understanding right now is that section 404 rules—basically the smoking rule—is not based under that theory.

Mr. **Mineta**. What about handicapped access regulations?

Mr. **Douglas**. I'm uncertain as to the handicapped issue. At present the Federal Trade Commission does not enforce any statutes relating to the treatment of the handicapped or discrimination against the handicapped.

Mr. MINETA. Your testimony seems to argue that if those consumer protection authorities are given to FTC you are well equipped to handle them.

Mr. DOUGLAS. That is correct.

Mr. MINETA. But you do not take the position this should go to FTC or any other particular agency? Is that correct?

Mr. DOUGLAS. That is correct.

Mr. MINETA. You therefore believe that there are other agencies to which the Congress might reasonably assign those functions, where the airline industry is concerned?

Mr. DOUGLAS. We really take no position on that. We have not appraised the capabilities of other agencies to carry out that function. We are neutral on the disposition of those authorities.

Mr. MINETA. Suppose, for a moment, the Congress specifically assigned section 411 or section 5 type authorities to FTC, and that Congress wanted to preserve section 404 as part of that. Does FTC now administer, for any other industry, a consumer protection authority similar to section 404(a)? And would it make sense to have that authority at FTC only for the airlines?

Mr. DOUGLAS. I do not believe that we have specific administrative authority of a similar type statue, as 404(a). That would have to be only a tentative statement.

Mr. MINETA. Now, on page 6 of your testimony you raised a very important question of whether, even if FTC got consumer protection authority over the airline industry, existing CAB consumer protection rules would transfer to FTC or whether consumers would have a long period of no protection in which FTC initiated rulemaking from scratch.

I am not sure, from your testimony, what your answer to the question is, except that it appears from the footnote that at least two of FTC Commissioners believe that the existing rules and regulations would not be preserved, even if the underlying consumer protection authorities were. So let me pose a hypothetical question. Suppose legislation is enacted, removing the section 5 exemption for airlines, but making no other changes. Under those circumstances, would the Board's existing 411 rules and regulations and pending cases transfer to FTC? And if not, how would FTC attempt to handle that situation?

Mr. DOUGLAS. If all that was done was to remove the exception of airlines from our jurisdiction and there was no affirmative transfer of the rules, it is my understanding—and I think it is noncontroversial with regard to the position of Commissioners Pertschuk and Bailey, also—that technically those rules would expire. The problem then facing the Federal Trade Commission would be whether to initiate new rulemaking procedures under our existing authority, which is basically Magnuson-Moss, or to attempt to enforce the spirit of these rules through individual, case-by-case prosecutions.

As I mentioned earlier, I think it is possible, and we certainly would attempt to enforce the rules by case-by-case prosecution. However, it is certainly easier to enforce existing rules than to try to adjudicate cases.

Mr. MINETA. If you were to undertake the Magnuson-Moss rulemaking requirements, how long would such a procedure take before those rules and regulations would be in place?

Mr. **Douglas**. It is difficult to say with any precision. However, to my knowledge, we have never promulgated a Magnuson-Moss rule in a time period of less than 2 years.

Mr. **Mineta**. As you point out on page 7 of your testimony, the Magnuson-Moss question applies not only to any rulemaking necessary to transfer existing rules to FTC, but also to any time new problems arise in the industry and require new or modified consumer protection rules. Exactly what are the Magnuson-Moss procedures? How do they differ from the Administrative Procedures Act rulemaking process that are used at both CAB and DOT? And how much time does it typically take to get a rulemaking response to a new problem through the Magnuson-Moss procedures?

Mr. **Douglas**. Congressman, I inquired of staff to explain that to me, as well. They made a side-by-side comparison for me, which I could submit for the record, as to the procedures which are followed under Magnuson-Moss.

Mr. **Mineta**. That would be very helpful, Commissioner.

[The following was received from Mr. Douglas:]

SUMMARY COMPARISON OF MAGNUSON-MOSS UNFAIR OR DECEPTIVE ACTS OR PRACTICES RULEMAKING WITH INFORMAL PROCEDURES UNDER SECTION 553 OF THE ADMINISTRATIVE PROCEDURE ACT [1]

Magnuson-Moss	Informal under section 553
Initiation by Commission or public petition.	Same.
Advance notice of proposed rulemaking published in Federal Register discussing objectives and alternatives and inviting public comment; notice sent to House and Senate Commerce Committees, with 30 day waiting period before initial notice of rulemaking.	Advanced notice not required; no notice sent to committees.
Initial notice of rulemaking published in Fed. Reg. for public comment; Commission must also issue preliminary regulatory analysis; projected benefits and adverse economic effects, alternatives.	Properly written informal notices will contain much the same material although not strictly required.
Final notice of proposed rulemaking must be published with designated issues and procedural instructions to public.	This would be combined in one step with paragraph above.
Commission accepts written comments.	Same.
Within 30 days after close of comment period public may suggest issues to be subject to oral examination, cross-examination, and rebuttal submissions.	Oral hearings held at an agency's discretion with no right to cross-examination.
Presiding officer is assigned; officer has broad powers to issue procedural rulings, including oral presentations under oath.	Rulemaking record generally assigned to staff attorneys who will review record and draft recommended final decision.
Hearing: Presiding officer shall conduct informal hearing with opportunity for hearing on all issues; disputed issues of fact material and necessary are designated for cross-examination and submission of rebuttal; groups with same interests shall designate single representative, unless member of group is unable to agree upon representative, in which case individual cross-examination is permitted (limited to issues of particular concern to that person); Commission staff or public may request issuance of compulsory process compelling attendance of persons, production of documents, or responses to written questions; if request deemed meritorious, presiding officer requests Commission to issue civil investigative demand.	N/A.
Findings and recommendations made by presiding officer.	N/A.
Staff recommendations made to Commission on record, including final rule recommendations.	Same.

SUMMARY COMPARISON OF MAGNUSON-MOSS UNFAIR OR DECEPTIVE ACTS OR PRACTICES RULEMAKING WITH INFORMAL PROCEDURES UNDER SECTION 553 OF THE ADMINISTRATIVE PROCEDURE ACT [1]—Continued

Magnuson-Moss	Informal under section 553
Post record comments on staff report and presiding officer recommendations subject to public comment period of no less than 60 days.	N/A.
Commission reviews record; Commission may allow further oral presentations.	Oral hearings at discretion of agency.
Rule promulgated, with statement of basis and purpose and final regulatory analysis, including manner in which acts were deceptive or unfair, economic effects, effects on state or local laws, need for and objectives of rules, alternatives considered, projected benefits and possible adverse economic consequences.	Final agency decision may include some or all of these elements.
Submission of final rule to Congress.	Generally N/A.

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[1] The informal 553 procedures described here are those that apply to agencies generally. They may be modified by the agency and can be more complex than described here. This example presents the simplest, yet most typical use of the 553 procedures (other than emergency promulgation of interim rules without notice and comment which is a highly unusual case). This comparison has been simplified for purposes of brevity. It does not represent the views of the Commission or any commissioner.

Mr. Douglas. I could summarize by saying that there are approximately twice as many procedural steps that must be taken under Magnuson-Moss. But more importantly, under Magnuson-Moss, formal hearings with cross-examination must be held under the aegis of administrative law judges. As to typical times, we have had Magnuson-Moss rulemakings that have taken anywhere from 2 years to 8½ years. Under CAB 553 rulemaking procedures, I understand that typically it takes 6 to 9 months to promulgate a rule. And, of course, emergency rules can be promulgated almost instantaneously.

Mr. Mineta. Fine. Minority Counsel, Mr. Filler, do you have some questions?

Mr. Filler. Thank you, Mr. Chairman. Just a couple of questions. Mr. Douglas, just to nail this down. Under Magnuson-Moss, is it correct that witnesses or interested parties enjoy the right of cross-examination as to any disputed issues of material fact in the proceeding?

Mr. Douglas. That is my understanding, yes.

Mr. Filler. And if Magnuson-Moss procedures were in effect, and the FTC had the authority to issue rules in the area of computer reservation systems, do you believe that the Commission would have been able to act as quickly as the CAB, at least quickly as it has done so far?

Mr. Douglas. No.

Mr. Filler. Thank you, sir. No further questions.

Mr. Mineta. Commissioner Douglas, let me thank you on behalf of our subcommittee. Please thank Chairman Miller, as well as the other members of the Commission, for the statement presented here by you.

Thank you very, very much.

Mr. Douglas. I certainly will. Thank you.

Mr. Mineta. You have been very helpful.

At this time, I would like to call on the Honorable J. Paul McGrath, Assistant Attorney General, Antitrust Division, Department of Justice.

The full text of your prepared statement will appear in the record at this point.

[Statement referred to follows:]

Testimony

of

J. PAUL MCGRATH
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

Mr. Chairman and members of the Subcommittee:

It is a pleasure to be here today to discuss with you the Justice Department's participation in the Sunset of the Civil Aeronautics Board and our plans for carrying out the Board's antitrust functions after January 1, 1985. Ensuring that this transition is smoothly accomplished is extremely important to the nation's air travellers as well as to the aviation industry in general. The Department accordingly regards the transition as one of its priorities.

This transfer was mandated more than five years ago, and the Department is now well prepared to perform these additional duties. On the basis of our experience in planning for this transfer, we believe that it can be accomplished efficiently without the enactment of any additional legislation.

The Department, of course, is no stranger to the aviation industry. During the last decade we have actively participated in numerous CAB proceedings. We were also among the first of the Federal agencies to urge deregulation of this industry, and we have worked closely with Congress, the Department of Transportation and the CAB to accomplish that important goal.

The Airline Deregulation Act of 1978 has in our view been a grand success. Overall, the industry is more competitive and efficient now than it was when the Act was passed, and taxpayers and air passengers alike have been relieved of the many costs of unwarranted regulation. These results have all been accomplished with minimal disruption and we congratulate the CAB and the authors of the Airline Deregulation Act for their success in moving this industry into a deregulated environment.

A key aspect of this Act is the Sunset of the Board and the transfer of its necessary functions to other agencies. In this statement, I will describe with particularity the Department's plans for assumming the CAB's antitrust functions. Before doing that, however, I think it is important to clarify the Department's general attitude toward these new responsibilities.

In particular, I wish to emphasize that the Department recognizes that after Sunset we will no longer be responsible solely for law enforcement and competition advocacy, but will also have an obligation to act in a quasi-judicial capacity in reviewing air carrier requests for antitrust immunity. Understandably, some might ask if the Department of Justice is capable of properly discharging both types of responsibility. I firmly believe that we are.

I suspect that those who may have doubts about the Department's ability to perform both roles hear of the Antitrust Division only when we are either suing someone or arguing against a request for antitrust immunity. If so, those persons may have the impression that the Justice Department reflexively opposes all joint undertakings involving competing firms, regardless of their merits.

In fact, however, there are many circumstances in which the Department finds that the joint efforts of competitors are unobjectionable or even procompetitive. This is because the antitrust laws prohibit only those activities that unreasonably restrain trade, such as price fixing or bid rigging among competitors. Those laws do not prohibit--and, indeed, are intended to promote--activities that yield economic efficiencies and hence promote consumer welfare. In those cases, of course, we don't file a lawsuit or oppose an immunity request and accordingly our decision is seldom publicized. For example, in the airline industry, we have often noted that the Area Settlement Plan, which is a clearinghouse for money owed by travel agents to airlines for tickets they have sold, is an efficient joint venture which does not reduce competition. Likewise, for every application to the CAB for Section 414 antitrust immunity that we have opposed, there have been hundreds to which we have expressed no objection.

The Antitrust Division also fully recognizes the important role that grants of antitrust immunity can play in international aviation. As you may know, two years ago the Division supported an agreement between the United States and the European Civil Aviation Commission (ECAC) that provided for continued CAB-granted antitrust immunity for carriers operating in the North Atlantic markets. We advocated this approach in recognition of benefits that could be gained in other areas.

The Department's important contribution to achieving the ECAC agreement was highlighted by Ambassador Trent, the head of the U.S. delegation to the ECAC talks, in his testimony before the Subcommittee on Investigations and Oversight of the Public Works and Transportation Committee on May 18, 1982.

Indeed, the Antitrust Division already has responsiblity for passing on requests for antitrust immunity for a variety of industries. We have been given this responsibility in such diverse legislation as the Export Trading Company Act of 1982, the Newspaper Preservation Act and the Defense Production Act. The record shows that we have exercised this authority in a fair and responsible fashion. We therefore see no basis in fact or logic to be concerned that we will treat air carriers any less fairly than we have treated Export Trading Companies, newspaper publishers, or defense contractors.

Let me now outline how the Department plans to exercise its authority under each of the sections that will transfer to us following the Sunset of the CAB.

SECTION 408: MERGERS AND SIMILAR TRANSACTIONS

As you know, Section 408 of the Act applies to mergers and similar transactions among air carriers and other firms substantially engaged in the business of aeronautics. That provision directs the CAB to approve such transactions unless they are found to be inconsistent with the public interest. In addition, a specific standard, which is very similar to that found in the antitrust laws, is set forth for mergers that raise competitive issues. */

In judging Section 408 applications, the Department will apply the "public interest" standard for approval, as required by the Act, focusing on the proposed transaction's likely competitive implications, as well as its effect on transportation needs and merged carriers' employees. In addition, when the public interest would be served, we will impose Labor Protective Provisions (LPP's) as a condition of approval. Our proposed regulations will therefore require applicants to state whether they agree to LPP's. If so, the Department will presume the agreed LPP's are in the public interest. In other cases, the Department, in its consideration of the public interest, will continue the CAB's current practice of weighing the likely effects of a merger on airline employees.

Although the language of Section 408 applies to a wide variety of possible transactions in the aviation industry, the Department does not expect that the administration of this

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*/ In particular, Section 408 requires disapproval of a proposed transaction if in any region of the country the transaction might substantially lessen competition or otherwise restrain trade, unless it can be shown that the transaction would achieve benefits that could not be achieved in a way that is reasonably available and materially less anticompetitive.

section will impose a substantial burden on our resources or the industry's. Because we firmly believe that there should be minimal government interference with the functioning of our market economy, we are carefully drafting our regulations both to minimize the number of Section 408 applications that will have to be filed and to expedite the processing of those applications that are filed.

For example, our regulations will continue the exemption that the CAB now grants to most aircraft acquisitions and will broaden the exemptions that the Board's regulations now allow for air taxi operators and firms engaged solely in cargo transportation. Similarly, our regulations will augment the CAB's existing procedure for granting exemptions to specific transactions. Our regulations will also speed up the review process for non-exempt transactions by providing that, in cases where no material facts need to be resolved, the Federal Register notice of the application can contain an order to show cause why the application should not be approved summarily.

We thus expect that most transactions under Section 408 can be consumated promptly and without undue regulatory delay or expense to the government or parties. There will, of course, be some applications that will require evidentiary hearings, but we expect that such applications will be relatively few.

SECTION 409: INTERLOCKING RELATIONSHIPS

Another provision that will transfer to the Department's jurisdiction is Section 409, which governs common directors, officers, or controlling stockholders of firms engaged in aviation. Section 409 flatly prohibits such relationships unless they have been approved in advance by the CAB. After comparing this provision with the terms of the comparable antitrust statute, Section 8 of the Clayton Act, the Department has concluded that the two provisions address the same types of potential problems. Accordingly, in the interest of minimizing regulatory burdens, we have decided to grant the aviation industry a blanket exemption from Section 409. This exemption, however, will not confer any antitrust immunity, and if any abuses occur they will be pursued by the Department under Section 8 of the Clayton Act.

Under the terms of our exemption, air carriers that believe they need antitrust immunity in order lawfully to carry out an agreement within the scope of Section 409 will retain the option of filing such agreements with the Department and requesting that they be granted antitrust immunity under Section 414 of the Act.

SECTIONS 412 AND 414: INTER-CARRIER AGREEMENTS

A third type of responsibility that the Department will inherit from the CAB is the authority under Sections 412 and 414 of the Act to approve and grant antitrust immunity to agreements among air carriers. The Department anticipates, however, that in the coming years we will be called upon to review only a limited number of Section 412 agreements, as the CAB has reviewed only a modest number of such agreements.

In the area of domestic aviation, for example, we expect that the number of agreements filed will be kept to a small number as a result of the 1978 amendments to Sections 412 and 414. These amendments specifically prohibited rate and capacity agreements among domestic carriers and made the filing of other types of agreements necessary only in those cases where the parties to the agreements wish to obtain antitrust immunity.

Thus, it is probable that most of the agreements that will be filed in future years by domestic carriers will fall in that narrow category of agreements that are neither clearly unlawful nor clearly lawful under the antitrust laws. We expect that agreements of this kind will typically involve joint ventures that facilitate the marketing of air transportation services or standardize interlining arrangements.

The CAB and members of the aviation industry have already identified the major existing agreements that fall into this category, and extensive proceedings have already been conducted concerning these arrangements. When the CAB has found that certain aspects of these agreements do not warrant continued antitrust immunity, it has revoked immunity. Conversely, when it has determined that an agreement does not need antitrust protection, it has declined to grant immunity. In other cases, where it appears that it may be possible to restructure existing agreements to comply with the antitrust laws, the Board has granted immunity as a transitional measure.

In general, the Department of Justice supports the CAB's current approach to reviewing such inter-carrier agreements. We recognize, however, that there can exist agreements that raise antitrust issues that cannot be resolved with finality in an administrative proceeding. For example, it may not be possible to predict the future competitive effects of some agreements as economic conditions change. Similarly, a few agreements may involve questions of antitrust law that have not yet been fully resolved by the courts. There may also be agreements that are particularly vulnerable to frivolous or vexatious antitrust suits by persons seeking treble damages. In such cases, the uncertainties about the outcome of potential treble damage actions may be so great as to preclude the parties to such an agreement from implementing it unless they are given antitrust protection.

The Department has carefully considered this problem and has concluded that in these kinds of cases it would be appropriate to remove this type of impediment to beneficial agreements by granting the parties to such agreements immunity from treble damage liability under Section 4 of the Clayton Act. In cases where we confer this type of limited immunity, the parties will still be subject to private antitrust suits seeking injunctive relief under Section 16 of the Clayton Act. The possibility of injunctive actions by firms adversely affected by such a partially immunized agreement will give the parties to the agreement an incentive to implement it in a manner that is consistent with the antitrust laws. Moreover, such injunctive suits could alert the Department in future years to agreements that may have become anticompetitive as economic conditions change.

At the same time, it is unlikely that the possibility of such injunctive actions will deter airlines from going forward with a partially immunized agreement. Moreover, private parties barred from recovering any damages would be unlikely to initiate such suits for frivolous reasons. Even if a court were to enjoin a particular agreement, the parties would always have the option of petitioning the Department for total immunity.

We recognize that our intention to grant partial immunity may seem novel, but we believe that partial grants of antitrust immunity are fully consistent with the language and spirit of sections 412 and 414. Section 414, for example, explicitly states that antitrust immunity may be granted "to the extent necessary" to permit a proposed agreement to proceed. As I have already described, there may be certain types of agreements for which only immunity from treble damage actions is necessary to enable the transaction to go forward. Such partial grants of immunity are not unknown in other industries, either. For example, in the Export Trading Company Act of 1982, Congress established a procedure under which Export Trading Companies could receive immunity from the trebling provision of Section 4 of the Clayton Act.

I would now like to comment on the Department's approach to Section 412 agreements that pertain to international aviation. The major activity in this category, of course, is that of the International Air Transport Association (IATA). The Department fully recognizes the role of IATA in international aviation and the necessity of treating IATA agreements in a manner consistent with the foreign policy interests of the United States, as mandated under Section 412.

Nonetheless, following the CAB's Sunset it will be necessary to make certain changes from the current system of regulating IATA's rate and fare resolutions. Specifically, we envision that the Department of Transportation will exercise regulatory authority over IATA's rates and fares. The Justice Department will grant antitrust immunity to IATA's organic agreement, so that all rates and fares adopted in accordance with its procedure, if not subsequently disapproved by the Department of Transportation, will automatically have antitrust immunity. As a result of this arrangement, we anticipate that DOT's regulation of IATA's rates and fares will be accomplished in essentially the same way as it has been under the CAB. */

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*/ In this testimony, I have not addressed whether existing IATA approvals would or should continue as they presently exist. Rather, my remarks today set forth how we would administer IATA matters generally, assuming existing approvals were to continue.

PROCEDURAL CONSIDERATIONS

Finally, I would like to outline briefly the procedures that the Department intends to follow in administering its new responsibilities.

Our regulations will include a provision delegating all of the authority of the Attorney General under Sections 408, 409, 412 and 414 to the Assistant Attorney General in charge of the Antitrust Division. This delegation will place responsibility for administering these provisions in the Division that has the relevant expertise.

In cases where the Assistant Attorney General for Antitrust concludes that a full evidentiary hearing is required, an administrative law judge will be designated by the Deputy Assistant Attorney General for Administation and a hearing will be held pursuant to Section 7 of the Administrative Procedure Act. The procedural rules governing such proceedings will be essentially the same as those now used by the CAB. We expect that in many such cases administrative law judges will be detailed to us from the Department of Transportation for this purpose.

Whenever a hearing is ordered by the Assistant Attorney General, the Antitrust Division's Deputy Assistant Attorney General for Regulatory Affairs will be designated as a party to the proceeding and attorneys and other professionals under his supervision will participate in the proceeding, just as they now do when the Antitrust Division participates in proceedings conducted by the CAB. Once the administrative law judge issues an initial decision, it will be reviewed by the Assistant Attorney General, who may then either adopt the initial decision, reverse it, modify it, or remand it for further consideration.

[illegible]

Also, our regulations will delegate to the Deputy Assistant Attorney General for Regulatory Affairs the responsibility for ruling on petitions for exemptions from the requirements of Section 408 and the authority to determine whether applications contain all the required information. Similarly, the Chief of the Antitrust Division's Transportation Section will be delegated responsibility for ruling on procedural motions in matters that have not been referred to an administrative law judge.

As is required of any agency engaged in adjudication under the Administrative Procedure Act, our regulations will provide for a separation of functions and contain prohibitions against improper ex parte contacts. Thus, in cases that have been referred to a hearing before an administrative law judge, there will be an explicit prohibition against all substantive communications about the case between Department employees who are acting in a decision-making capacity and employees who are involved in the case as advocates. The Assistant Attorney General and his advisers will thus be precluded from communicating about a case on an ex parte basis with the Deputy Assistant Attorney General for Regulatory Affairs or his subordinates.

In addition, as a further safeguard, our regulations will provide that attorneys who are involved in regulatory matters concerning particular firms will not be permitted to participate in active antitrust investigations or cases involving any of the same parties. As well, our regulations concerning ex parte contacts from persons outside the Justice Department will specify that parties to proposed mergers will not be permitted to contact persons in a decision-making capacity at any time after they have agreed between themselves to enter into the merger. Drafting of the regulations I have described is already near completion, and we intend to release a draft version of the regulations for comment in the near future.

Mr. Chairman, that concludes my prepared testimony. I will happy to respond to any questions from you or other members of the Subcommittee.

Mr. MINETA. Please proceed.

TESTIMONY OF J. PAUL McGRATH, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE, ACCOMPANIED BY ELLIOTT M. SEIDEN, CHIEF, TRANSPORTATION SECTION, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE

Mr. McGRATH. Thank you, Mr. Chairman.

I'm here this morning with Mr. Elliott Seiden, who is the Chief of the Transportation Section of the Antitrust Division. He and his section have been responsible for our involvement in CAB matters and in other related matters for some time. If there comes a point where, on detailed questions, his expertise may be helpful, I would like to call on him to respond.

I would prefer, rather than reading my prepared statement, to just hit on a few points that I think are most critical.

I'm obviously very pleased to be here this morning to testify concerning our Department's participation in the CAB sunset program and, in particular, for our plans to carry out the responsibilities that are to come over to the Department of Justice early next year.

I would like to mention a few general points that are of particular concern to us. Since the CAB sunset was mandated some time ago, obviously we have had an opportunity to consider many aspects of this subject. We are confident that the principal goal of all of us right now will be carried out, that the transition from CAB regulatory authority will be smooth and that the public and the industry will be well served in this interim period.

At the Department of Justice, we have had a great deal of experience in the kinds of matters involved. We have participated in many CAB proceedings. We have worked on the whole deregulation program. We have been active with DOT and others in connection with international agreements and international understandings.

I would like briefly to mention some of the key points involving our plans to carry out our functions under this statute. First, there has been a concern voiced by some that the Department of Justice would be an inappropriate agency to carry out these antitrust functions because, to put it colloquially, people claim we have just taken knee-jerk responses that any kind of industry cooperation is a bad thing under the antitrust laws and that we are congenitally opposed to any kind of immunity.

I would like to debunk that kind of concern. First of all, it is true that in past formal proceedings, where we have been parties either in court or before a regulatory agency, we have raised questions about immunities or about the legality of certain conduct. The reason for that, of course, is that those have been the occasions when we have been called upon to act.

It is also true that in the vast bulk of proposed agreements and proposed immunities, we have either acquiesed in or have agreed to the result.

Second, when the statutory functions come over to the Department of Justice, we will have a somewhat different role than the role we have had in the past. The role we have had in the past has been solely that of antitrust prosecutor and antitrust commenter.

The new role would be that of a quasi-regulatory sort, and we would have public interest statutory standards with which we would have to comply.

I would like to mention some particular points under the statutes involved. First of all, section 408, which deals with mergers, and similar kinds of arrangements, would give the Department of Justice the statutory obligation to consider mergers under a public interest standard and to consider such matters as the impact of the proposed merger on transportation service and on employees.

That kind of standard obviously is somewhat different from the standard that we apply in normal merger situations under section 7 of the Clayton Act. And in enforcing that statute, we would take that difference into account.

Section 409 deals with interlocking directorates. We have indicated that when this statutory obligation comes to us, we would grant a blanket exemption to the industry from this section and simply deal with interlocking directorates under section 8 of the Clayton Act, which applies to all other corporations. We doubt that there would be very many problems raised under that section with respect to this industry.

Sections 412 and 414 are the sections of the act relating to agreements and to immunities in the domestic area. We doubt that there will be very many such agreements for us to consider. During the last few years, under the changed world of the 1978 Airline Deregulation Act, the CAB has considered few such agreements. The ones that have been considered have been joint-venture type arrangements. In general, we will follow the same kind of approach that the CAB has followed. That is, we will consider these agreements on a case-by-case basis. We will grant immunity, to put it generally, where a given agreement is important to the industry and where immunity, as a practical matter, is necessary for the carrying out or implementation of the agreement.

Our intention, when we grant immunity, would be to grant immunity from treble damage actions, as opposed to immunity from injunctive suits. That is because we think that in most cases that would be all that would be necessary in order for transaction to go forward and that there would be some benefit to leave open the possibility of injunctive actions.

However, in those situations where that would raise trouble, we would also grant immunity from injunctive lawsuits.

In the international area, our intent would be that DOT would be the agency responsible for the rates. The Department of Justice's function would be simply to pass on the organic agreements involved. And of course rates approved by DOT would then be immune from the antitrust laws.

As far as the procedures that we would follow, the focus of our effort would be the Transportation Section of the Antitrust Division. We would plan to have Department rules that would delegate the statutory functions from the Attorney General to the Assistant Attorney General in charge of the Antitrust Division. We would have hearing procedures that would, if hearings were necessary, comply with the Administrative Procedure Act and require the appropriate separation between the hearing officials and the case officials, and also the appropriate ex parte rules.

That, Mr. Chairman, in general are the points that I would like to make, and I would be happy to answer any questions that the subcommittee may wish to put.

Mr. MINETA. Mr. McGrath, thank you very much. I understand that the Department of Justice's position is that if there is no legislation and Justice gains responsibility for approving agreements, mergers, and interlocks, that Justice will discharge its new responsibilities competently and conscientiously.

Mr. MCGRATH. Yes, Mr. Chairman.

Mr. MINETA. But suppose we do decide to adopt legislation? Do you see anything wrong with giving responsibility for granting agreements and granting antitrust immunity to DOT? DOT will be regulating routes and rates internationally, and as we know, granting antitrust immunity is often related to route and rate policy. Also DOT has considerable expertise on the questions at issue in antitrust immunity, whether there is an overriding transportation need and whether alternative arrangements which would be less anticompetive are feasible.

Do you see any problems in our deciding to give DOT responsibility for antitrust immunity and agreements?

Mr. MCGRATH. Yes, I do, Mr. Chairman. I think that the statute that is now on the books makes good sense in the way that it defines this authority. The Antitrust Division of the Department of Justice is the agency that has the expertise in determining and deciding the kinds of competition issues that we are talking about here.

In addition, because of the immense amount of background that we have had with this industry before the CAB and with DOT, it also makes sense that we utilize our competitive expertise specifically with regard to this industry. In addition, we anticipate that after sunset, a number of the people who would be coming over from the CAB would add to that expertise. Moreover, the expertise of DOT would hardly be lost to us. We anticipate that they will be available to participate as necessary, and appropriate and as they may desire in any of these proceedings. That expertise will not be lost.

So for all those reasons, I think that the current law makes good sense, and that changing it would not really make very good sense.

Mr. MINETA. A few years ago, the administration's position was that authority to grant antitrust immunity should be given to the Department of Transportation rather than the Department of Justice. And so far as we were aware, the Department of Justice was not opposed to this position.

Why have you now changed your mind?

Mr. MCGRATH. I have not personally changed my mind on this, I would like to say, Mr. Chairman. I think there are several points to make.

One is that, at least from my independent point of view, I think the current disposition of authority makes good sense. I also think overall it makes good sense to leave the statutory authority generally the way it is. I am not talking now just about the division of antitrust and other authority, but I am talking about the whole Airline Deregulation Act. Rather than going back a few steps and taking another crack at it, I think there is a lot to be said for leaving it the way it is.

Mr. MINETA. Now, did the Department of Justice change its mind before or after you were approached by the Department of Transportation on the no bill approach?

Mr. McGRATH. I don't know the answer to that. The only answer I personally know to that is that when I moved over to the Antitrust Division, our position was this. I do not know at what time, if any, the Department changed its approach.

Mr. MINETA. Mr. Seiden.

Mr. SEIDEN. Mr. Chairman, the Department accepted the notion of transferring authority to the Department of Transportation in the context of the 1981 early sunset legislation with very different goals in mind. The early sunset legislation reflected those goals.

They were first that sections 408 and 409 would be repealed. And the authority under section 412, with respect to domestic agreements, would be extended for a relatively short transition period and then repealed, leaving in place only on a permanent basis sections 412 and 414 authority with respect to international transportation. That means primarily the IATA rate and fare agreements.

Given that, the Department of Justice accepted the wisdom of the early sunset deregulation formula worked out within the administration. But looking at the situation we now have, which is contemplating the indefinite survival of sections 408, 409, and 412, the Department feels, as Assistant Attorney General McGrath has pointed out, that if an agency of the Federal Government is going to have a continuing responsibility to administer those programs, it should reside in the Department of Justice. These are inherently antitrust type statutes, and we feel we are the agency that has the expertise on these issues.

As to when we changed our minds, I was a participant in the decisionmaking process before Mr. McGrath joined us, with Mr. Baxter, and we changed our minds on that considerably before we received any approach by DOT.

Mr. MINETA. In international aviation, isn't there a relationship between mergers and the selection of carriers for international routes?

Suppose, for example, after sunset, one of the U.S. carriers in international aviation gets into financial trouble and wants to merge with another international carrier. Suppose for reasons having nothing to do with the antitrust laws, DOT thinks it would be better for U.S. consumers for a third carrier to take over the route of the failing carrier. Under the law, the Department of Transportation would have the authority to refuse to transfer the certificates.

Does this split in authority make sense, and wouldn't it be better sense for the same agency to deal with the merger and the transfer of routes?

Mr. McGRATH. I really do not think that situation would raise any problems, because we would contemplate that in the course of determining whether the agreement should be approved we would look to DOT to provide us with any comments on relevant matters. In this case, the comment obviously would be on the very important question of who would do the routes and so on. It would get to some of the critical public-interest questions that would have to be decided in determining whether or not the merger would be approved.

So for that reason, I do not see any reason why it would be a problem. That kind of thing frequently can happen in merger situations where there may be some other regulatory—State, local, Federal—concern that will have an important bearing on whether or not the merger is or is not to be approved.

Mr. MINETA. Do you mean to suggest in your testimony that you see a difference between your role before CAB sunset, when you would recommend to CAB whether to grant exemptions from the antitrust laws, and your possible role after sunset when you would be deciding for yourself whether to grant the immunity?

Mr. MCGRATH. I think there is a decided difference. In the context of only making suggestions to the CAB as the Department of Justice, of necessity we have focused on one aspect, and that is the competitive aspect. And of course our bent in that area is for competition, for less exclusivity, for less joint action.

The mandate, however, of the CAB—and assuming the 1978 Deregulation Act goes into effect—the Department of Justice, after January 1, 1985, would be broader. It would cover a broader range of public interest standards. So that at least in theory, our role would be different.

In practice, however, I would note that in a number of situations the Department of Justice has expressly approved joint arrangements among competitors. The ECAC agreement is the classic example. In a number of other situations, the CAB has not granted immunity. It has simply approved agreements, agreeing with suggestions we have made.

I do not have some kind of a grid showing when we have urged them not to grant immunities and they have granted immunities, but I do not think the record, in fact, is quite as disparate as some have suggested.

Mr. MINETA. But whether you are making a recommendation to the CAB or whether you have to make that decision yourself to grant the immunity, aren't you under the same test in terms of the public interest?

Mr. MCGRATH. The ultimate decision, yes, is the same test, whether they are making it up to next December 31 or whether we are making it after that.

Mr. MINETA. But you said that your recommendations might possibly be different, when you are making a recommendation to CAB as compared to when you are making a decision yourself. It seems to me what we are trying to determine here is, to whom should this responsibility go? And to the extent that we decide where it goes—let's say the Department of Transportation—that they are able to look at the transportation benefits as compared to your role in the Department of Justice where it may be based on the antitrust problems that would be evident or be created.

Mr. MCGRATH. Up to now, as a general matter, we have not advised the CAB overall on what they should do with mergers or agreements. Typically, our role has really been to sensitize them on the competition issues. That has been our role.

So just looking over filings we have made, frequently we have *only addressed that aspect of a given transaction, because that has* really been the somewhat less broad role that we have had.

I would repeat what I have said before. I do not think on the competition issues, that our recommendations have been substantially different from the conclusions that the CAB has reached. They also have had to deal with other issues that frequently we have not addressed, issues of the health of the industry and considerations of industry and traveler welfare.

Mr. MINETA. But you are making those recommendations based on your mandate, which is the antitrust mandate?

Mr. McGRATH. That is correct.

Mr. MINETA. What about the transportation benefits?

Mr. McGRATH. The transportation benefits also have to be considered, if we are talking about agreements or mergers. That is what the statute mandates, the broader public interest kind of a standard. That is what CAB has had as its standard, and that is what we would have under the statute.

Mr. MINETA. Recently the perception has been that Justice has moderated its position and is now more inclined to take account of transportation benefits.

Is this a change in the Department of Justice's position recently? And if so, has this change been directed from the top, or is there a new attitude among the staff?

Mr. McGRATH. I think that's about what the attitude is. The attitude is that when the statutory authority comes over, we clearly have to look at the broader public interest. Before the statutory authority comes over, we have to do the same thing also. We are dealing essentially with a deregulated environment. We are dealing with an antitrust philosophy that looks not simply to narrow questions of concentration or whether given parts of an industry are cooperating together, but rather an antitrust philosophy that is based on conclusions of consumer welfare and efficiency.

And I think the merging of the deregulation philosophy and the kind of antitrust philosophy that we have been espousing, at least since Mr. Baxter and I have been running the Antitrust Division, indicates that overall the policy is the same one, before and after sunset: That we should not look at concentration questions in kind of a narrow, "Are people getting together" type sense, but rather should look at them more broadly asking, "What are the efficiencies?"

Mr. MINETA. Have you given any consideration as to how many slots you would add to administer the responsibilities you would gain if the Airline Deregulation Act of 1978 is not amended, and will the number of new slots enable you to take on CAB employees currently administering those functions?

Mr. McGRATH. Yes; I have. The proposal has been that 20 full-time slots or their equivalents would move from the CAB to the separate line item budget of the Antitrust Division at the time of sunset, along with sufficient funds for the remaining three-fourths of the next fiscal year to accommodate those slots.

I have personally satisfied myself on two grounds. First, that the amount of money allocated to the slots is sufficient to handle the slots and the functions. And second, that the number of people being transferred are at least sufficient to do the work.

Mr. **Mineta**. Thank you. Mr. Hammerschmidt.

Mr. **Hammerschmidt**. Thank you, Mr. Chairman. Mr. McGrath, one of the issues that we will have to decide [illegible] whether or not we should put an outside time limit on the Government's authority to grant antitrust immunity in various circumstances. Do you believe that an expiration date for this is desirable?

Mr. **McGrath**. I would personally prefer that such a date not be enacted for this reason. I don't think it is necessary, and I'm always concerned about outside dates that people tend to decide things on the last day.

We have a practice in a number of situations of expediting things where there is a particular reason to do so. For instance, under the merger notification provisions, there are certain time limits built into the rules, but we frequently give early clearances where there is some business reason that calls for it.

Where we have requests for business clearance letters, again, where there is some particular reason for expedition, we go ahead and deal with things promptly. My anticipation would be that the approval of agreements and the approval of immunities would also happen on that kind of a prompt basis.

I'm looking at the track record with the indication that there would not be a problem. I am a little bit troubled by time limits. The tendency in a bureaucracy, our bureaucracy or anybody else's, is that if you have 90 days to do it, particularly when lawyers are involved unfortunately, it gets done on the 90th day.

Mr. **Hammerschmidt**. Let me ask this. If this committee and the Congress in its wisdom decided to put a time limit on antitrust authority domestically, would it be easier for the Justice Department to accept DOT having that authority?

Mr. **McGrath**. No; it would not. We would still prefer to have the authority. We would hope there would be an exception for situations that required a lot of investigation and so on. But we would still prefer the authority.

Mr. **Hammerschmidt**. Last month the Department put together a policy statement concerning its intentions in the area of granting antitrust immunity to intercarrier agreements and indicated that it would encourage carriers not to file agreements that pertain to domestic aviation.

As a result of this statement, many in the industry believe that the Justice Department is sending a clear signal to the industry that they will be inclined not to grant antitrust immunity as a general proposition.

Is this fear justified?

Mr. **McGrath**. No; I do not think it is. There are certain kinds of agreements, for instance, that raise no conceivable antitrust question at all. And where that is the case you really do not need to have a proceeding to deal with them.

We have indicated, however, that there are certain other types of agreements that probably do raise substantial questions so that immunity is clearly called for. An example is, under the area settlement plan, as I understand it, there is a specific date when payments have to be made. You could argue that that is sort of a joint setting of credit terms, and therefore, an antitrust problem.

I would think that argument is sufficient to indicate that that would be the kind of situation that would call for immunity. I think the real question is, if there is enough of a question, an antitrust question raised by an agreement like that, then immunity really ought to be called for because otherwise it may be difficult for the participants in the industry to go ahead and run the industry.

That really ought to be the guiding light. How do you run the industry? What is the best way to do it? And what is the best way to serve the passengers?

Mr. HAMMERSCHMIDT. Thank you, Mr. McGrath. And thank you, Mr. Chairman.

Mr. MINETA. Mr. Packard.

Mr. PACKARD. Thank you, Mr. Chairman. As you know, the CAB has recently issued proposed rules involving airline computer reservation systems. I am sure you recall that some months ago your department also conducted an investigation into these issues and concluded that the CAB rulemaking was the most appropriate way to address the problems.

Now that the Board has issued their statements and proposals, do you still share that opinion?

Mr. MCGRATH. Yes; I do. The main reason that we decided that we would, in effect, go the CAB route and not go further with our own legal proceeding was that we felt rulemaking would be a better alternative, because rules could cover the whole industry. That is, the regulatory agency could do that and we could not do it.

I think it is working out, and hopefully, that whole system will go over to the FTC after sunset.

Mr. PACKARD. Do you believe that the Justice Department will be making any formal comments on the CAB's proposal in their statement, in the near future?

Mr. MCGRATH. Do you mean on the proposal they came out with about 3 or 4 weeks ago?

Mr. PACKARD. Yes.

Mr. MCGRATH. Yes. There are a few items that were not quite the way we would have liked them, and we will have a few thoughts.

Mr. PACKARD. Would you briefly describe the procedure that the Justice Department uses when it reviews proposed mergers in other industries? How would these procedures differ from those that would be required under section 408?

Mr. MCGRATH. The main difference is that under this kind of a regime, that is the 408 regime, in a few mergers we actually would have to have evidentiary hearings. I say a few mergers, because I would anticipate that the vast bulk of mergers would raise no questions at all and simply would be approved.

But in any merger that raised a substantial competiton question, there might have to be an evidentiary hearing. And then we would obviously have to comply with APA-type procedures, and would have to have rules accordingly. And then that would be subject to normal APA-type review in the courts.

Normally, when we make an enforcement decision on a merger, it is simply a decision that is recommended by the staff to the Assistant Attorney General. And then, he makes a decision. But that decision is not whether the merger will be approved. That decision is simply whether the Department of Justice would go to court and file an action to block the merger.

Now, one similarity with our normal merger procedures, would be where there are issues of fact that involve the expertise of a given agency. We would go to that agency for information and for their expertise. If it involved foreign commerce matters, we would go to the Commerce Department, let's say. Transportation matters, where the DOT could be helpful, we would get their expertise. We would do that here also.

But it is probable that in the course of an adjudicatory proceeding under the APA, that those comments might have to be more formally received. So there would be those procedural kinds of differences.

Mr. PACKARD. Thank you very much.

Mr. MINETA. I believe, Mr. Filler, you have something you would like to have clarified?

Mr. FILLER. Just a brief question or two, Mr. Chairman. Mr. McGrath, I think there might be a need to clarify an earlier question and response relative to the time limit for antitrust authority.

Would it be appropriate to place an outside time limit on the Federal Government's authority to grant antitrust immunity domestically, let's say, to intercarrier agreements? For instance, beyond a date, 3, 4, or 5 years from the date of enactment, should any Federal agency have the authority to grant immunity to domestic intercarrier agreements?

Mr. MCGRATH. Are you saying in other words, the sunset——

Mr. FILLER. That's correct, sir.

Mr. MCGRATH. I do not think that is necessary. The statute as it now exists is really a kind of a dynamic thing. It gives flexibility over time to either grant or not grant immunities. To grant immunities for set periods of time, to revoke them. I think it would be better just to leave it as an open-ended living statute rather than to attempt to decide, just how long everything might be needed. I think it is better to leave it flexible.

Mr. FILLER. You believe the need might arise in the future to have this authority exercised in the domestic area then?

Mr. MCGRATH. The immunity authority?

Mr. FILLER. Yes, sir.

Mr. MCGRATH. Oh, yes. Indeed, I mentioned an example before, the area settlement plan, and immunity for instance, for the particular day of settlement provision. That would probably be an area where immunity would continue to be needed because of the nature of the agreement.

Mr. FILLER. Do you see any considerations which might favor, putting an outside time limit or a sunset date on domestic antitrust authority?

Mr. MCGRATH. No; I do not think so.

Mr. FILLER. Does the concern relative to treating the domestic airline industry in a manner similar to the way other industries are treated enter into the picture, as far as the Department is concerned?

Mr. **McGrath**. In the most perfect of all our worlds it would be nice to treat all industries the same, I suppose. But there are a number of considerations involving this industry, particularly involving the enormous changes that have occurred over the last few years. These considerations also involve concern for the continued safety and convenience of travelers in what is, after all, a common carrier type of environment, that make this situation a more complicated one.

And that being a given, some of the things that have grown up which Congress has chosen not to change, or things which have grown up which involve huge, in effect, agreements in place, such as the way the travel agents fit into the business, are things that we should not just say overnight, well, let's change all of that.

We recognize all of that. And we recognize that there is a background here that has been built up in the CAB and so on. And consequently, I think, to just say, "Let's make this industry exactly the same as all others," probably would be on my part an overly simplistic conclusion.

Mr. **Filler**. Thank you very much, sir. Thank you, Mr. Chairman.

Mr. **Mineta**. Any other questions?

[No response.]

Mr. **Mineta**. Mr. McGrath and Mr. Seiden, thank you very much for your testimony here today. At this point the subcommittee will stand in recess, and we will reconvene sometime after the full committee meets.

The full committee will be meeting in here at 1:30 to take up the budget of the programs in the jurisdiction of the Public Works and Transportation Committee as part of the total budget resolution. I would assume that that will take at the most, maybe 15 minutes.

So let's reconvene at 1:45 here in room 2167.

[Whereupon, at 12:27 p.m., the subcommittee was recessed, to reconvene at 1:45 p.m., this same day.]

AFTERNOON SESSION

Mr. **Mineta**. The subcommittee will please come to order.

We are pleased at this time to call forward Mr. Oliver W. Krueger, Associate Director of the Resources, Community, and Economic Development Division of the General Accounting Office.

Mr. Krueger, the full test of your prepared statement will appear in the record at this point.

[Statement referred to follows:]

STATEMENT OF OLIVER W. KRUEGER, ASSOCIATE DIRECTOR, RESOURCES, COMMUNITY, AND ECONOMIC DEVELOPMENT DIVISION, GENERAL ACCOUNTING OFFICE

Mr. Chairman and members of the subcommittee: We appreciate the opportunity to be here today to discuss our ongoing review of the future of the Civil Aeronautics Board's (CAB) consumer protection functions. This review, undertaken at the request of Representative Elliott H. Levitas, Chairman, House Subcommittee on Investigations and Oversight, Committee on Public Works and Transportation, concentrated on three areas:

The extent to which the plans of DOT and others provide for an orderly transfer of CAB's consumer protection functions, The potential changes in consumer protection should no further legislation be enacted, and

Legislative options for ensuring an orderly transfer of CAB's consumer protection functions.

BACKGROUND

Much of CAB's regulatory authority was repealed in the Airline Deregulation Act of 1978, but the CAB has continued to administer a number of consumer protection regulations and functions. The bulk of the remaining regulations still in effect were issued pursuant to section 404(a) of the Federal Aviation Act which concerns safe and adequate service, and section 411 which addresses unfair methods of competition and deceptive practices. Examples of these regulations include airlines' liability for lost or damaged baggage, procedures airlines must follow when they overbook a flight, requirement for a nonsmoking section on aircraft, procedures which charter operators must follow and provisions that prohibit discrimination against the handicapped. Also, the Board has recently published a final rule prohibiting new airlines from collecting money or issuing tickets until they obtain CAB approval to operate. In addition, the CAB has the authority to permit airline agreements, and grant antitrust immunity, when the Board finds it to be in the public interest. Although the CAB is continuing to carry out a broad range of consumer protection regulations, its functions are scheduled to terminate on January 1, 1985.

In a January 1980 report on CAB's sunset planning efforts (The Civil Aeronautics Board Should Expand Its Sunset Planning (CED-80-46), January 4, 1980), we concluded that the disposition of CAB's consumer protection regulations was not specifically addressed in the Airline Deregulation Act. At that time, we recommended that CAB expand its sunset planning to include the development of a legislative proposal to address this gap. Based on our current review, plans for transferring CAB's consumer protection regulations at sunset do not resolve this issue.

PLANNING FOR TRANSFER IS INCOMPLETE AND INCONSISTENT

Current planning for the transfer of CAB's responsibilities is incomplete, and views of the three agencies directly involved—DOT, CAB, and FTC—differ on which agency should assume CAB functions. DOT's current planning suggests no further legislation is required to continue CAB's consumer protection regulations. The Department believes that DOT and the Federal Trade Commission will have authority to administer these functions and regulations under their existing statutes. DOT believes that FTC will be able, under its own authority, to regulate domestic air carriers in all areas currently regulated by the CAB under section 411. In this regard, DOT suggests that the legislative requirement exempting air carriers from FTC jurisdiction will no longer apply when the CAB sunsets. DOT's planning further envisions establishing a consumer affairs office within DOT to handle all airline consumer complaints, even though many enforcement actions under their plan may fall under the authority of FTC.

CAB, on the other hand, now favors placing authority to regulate all air transportation—including consumer protection regulations—at DOT. The Board's position appears to be that, without further legislation, no agency will have specific authority to enforce consumer protection regulations promulgated under sections 404(a) and 411 after CAB's sunset.

In our discussion with FTC officials, they indicated that their capacity to take over CAB's consumer protection functions would be impeded by two factors. First, they believe the FTC would continue to be precluded under its act from regulating aviation matters. The FTC further believe that it would be constrained in revising existing CAB regulations or in issuing new rules because of FTC's formal, time-consuming rulemaking procedures as contrasted to the more expeditious process available under existing CAB procedures.

IMPACT ON CONSUMER PROTECTION ABSENT ADDITIONAL LEGISLATION

Based on our assessment of the factors affecting CAB's consumer protection functions, we offer a number of observations on what could happen should no further legislation be enacted. The future of CAB's regulations is unclear, the authority of FTC to assume those functions is questionable, and the permissible range of state actions is uncertain. Thus, a decline in consumer protection could possibly occur with a potential for increased litigation.

THE FUTURE OF CAB'S EXISTING AND PROPOSED CONSUMER PROTECTION REGULATIONS IS UNCLEAR

The sunset provisions of the 1978 Deregulation Act, including its legislative history, provide neither for the survival nor the transfer of the CAB's consumer protection regulations. Moreover, the legal authorities for issuing these regulations as they relate to domestic air service—sections 404(a) and 411—are not clearly transferred to any agency. Thus, it is unclear, in our view, whether the regulations survive. And if they do, which if any, federal agency can enforce them.

THE FEDERAL TRADE COMMISSION'S AUTHORITY TO ASSUME CAB'S CONSUMER PROTECTION FUNCTIONS IS QUESTIONABLE

The FTC is legally barred from regulating unfair methods of competition and deceptive practices of air carriers subject to the Federal Aviation Act of 1958. In our opinion, specific legislation appears necessary to allow FTC to act in aviation matters. Based on our interviews, the FTC agrees that it could not absorb CAB's consumer protection functions until the statutory bar was removed.

Even if the bar were removed and FTC could assume CAB's consumer protection functions, it is questionable whether the FTC could assume and enforce the CAB's existing regulations without specific legislative authority to do so. Absent such legislation, if the FTC wanted to amend the CAB's regulations, or promulgate new regulations, it would have to commence new rulemaking under the formal procedures—a lengthy process—set forth in the FTC Act.

THE FUTURE OF FEDERAL PREEMPTION IS UNCLEAR

The Airline Deregulation Act of 1978 includes a specific Federal preemption section (105(a)(1) of the Federal Aviation Act of 1958); it prohibits states from enacting and enforcing state laws and regulations covering services provided by air carriers having authority to provide interstate air transportation under Title IV of the Federal Aviation Act of 1958. However, since most of Title IV lapses with CAB's sunset, it is unclear whether the prohibition will continue to apply. We were told that many states have statutes which exclude air carriers from state regulation but the exclusion is usually based on carriers being licensed to operate under Title IV. State officials we interviewed and the Air Transport Association agree the future role of the states is unclear.

These officials also believe that the situation is clouded by the uncertain status of Section 404(a). They express concern that, as the authority under section 404(a) has not been transferred to any federal agency, the federal government would be powerless to enforce it. Thus, if the federal preemption section continued to survive, it is possible that neither the federal government nor the states would have legal authority to issue and enforce consumer protection regulations on interstate air transportation. Officials of the Air Transport Association expressed concern that states, recognizing the unenforceability of the federal preemption and comsumer protection statutes, would develop their own regulations. Such a situation, they argue, could lead to overlapping and burdensome state regulation and taxation. Further, officials of the Air Transport Association noted that, faced with the anomaly of section 404(a) being unenforceable by any federal agency, consumers could argue for, and federal courts could sustain, a private right of action under section 404(a), a result which does not appear to have been intended by the Congress. Thus, without clarifying legislation, the potential exists for unnecessary litigation concerning the respective rights and obligations of consumers and the airlines.

POTENTIAL LEGISLATIVE CONSIDERATIONS TO CLARIFY CONSUMER PROTECTION FUNCTIONS

Officials from airlines, trade associations, state agencies, and consumer organizations we talked with generally agreed that some form of legislation was needed. While there was no overall consensus on the content of the legislation, the following areas were of most concern:

(1) Whether to repeal or continue the CAB's consumer protection regulations,
(2) If regulation should continue, who should regulate,
(3) The future and scope of federal preemption, and
(4) The proper jurisdiction for the oversight of antitrust immunity and joint air carrier agreements.

WHETHER TO REPEAL OR CONTINUE THE CAB'S CONSUMER PROTECTION REGULATIONS

Those who support full repeal of all the consumer protection regulations and functions believe that true deregulation requires that the government not dictate the terms of the contract between airlines and passengers. They point out that with deregulation, airlines are highly competitive and will have an incentive to please their customers because they rely so heavily on repeat business. They also agree, however, that the absence of federal standards will lead to disparity in the practices of various airlines such as the limit on baggage liability. They further state that consumers will benefit by allowing airlines to "unbundle" the services currently included in a ticket price. This would permit airlines to set the price of separate aspects of service such as baggage handling and inflight amenities and allow consumers to choose whether or not to purchase those services.

Those favoring continuation of the regulations express concern that without regulations the marketplace will not handle most areas of consumer rights adequately. They believe that the relationship between airlines and passengers is such that protection would decrease without a commensurate gain to consumers. They cite the difficulty of comparison shopping and the limited incentive for carriers to conduct negative advertising such as "we pay you more when we lose your bag." They believe these factors would diminish the information available to consumers—a necessary condition for an effective competitive market.

Particular areas of support for continued regulation included the continuation of CAB's rules designed to ensure unbiased computer reservation systems, limit the advertising and sales of tickets prior to CAB's approval to operate, and regulate charter operators. There was somewhat less agreement on the continuing need for CAB's rules on baggage liability limits and denied-boarding compensation.

Given the differences in view, GAO believes the best approach would be legislation transferring CAB's current and proposed consumer protection functions to another federal agency. While a number of the current regulations are strongly supported and seem to have continuing merit in a deregulated environment, other rules might be unnecessarily restrictive and could impede the achievement of the full benefits of a competitive market. Under this approach all CAB's consumer protection functions and existing rules would be transferred intact, however, the receiving agency would have sufficient flexibility to revise, amend, or even rescind the rules. If this is done, we believe the agency should conduct a careful evaluation of the impact of such changes, and retain the right to act quickly if such reforms fail to yield overall public benefits.

WHO SHOULD REGULATE

A number of views were expressed during our interviews on where CAB's consumer protection functions should be housed. Some favor transferring the functions to the FTC, while others favor continuation of the CAB. However, most observers we talked with believe the best option is to transfer CAB's consumer protection functions, including the existing and proposed regulations, to DOT.

Those favoring FTC note that regulation of unfair methods of competition and deceptive practices—the statutory basis for much of CAB's consumer protection activities—is the prime responsibility of the FTC. Supporters of this option generally want airlines to be treated like any other industry and favor transferring only the CAB's functions and not their regulations. DOT's rationale for preferring FTC appears to be based on their assumption that CAB's consumer protection functions can be transferred to FTC without legislation.

A number of the state officials we interviewed expressed an interest in retaining the CAB, not to reverse the economic deregulation accomplished under the Airline Deregulation Act of 1978, but rather to ensure the continuity of CAB's positive role in providing a single forum for most nonsafety aviation matters. Alternatively, the choice of these officials was generally to transfer CAB's consumer protection functions and regulations to DOT.

Overall, most officials we interviewed—from airlines, trade associations, state agencies, and consumer organizations—favored transferring CAB's consumer protection functions to DOT. While the views of these officials varied, their reasons for favoring DOT as the sole recipient agency were to avoid fragmentation of responsibilities across several agencies and to capitalize on DOT's transportation expertise. A number of officials also cited reasons which contrast the advantages of assignment to DOT rather than to the FTC:

DOT would be in a better position to act more expeditiously, using informal rulemaking procedures, DOT's plan to assume CAB's consumer complaint processing activity is likely to have a greater deterrent effect if DOT also has the authority to initiate appropriate enforcement action against those violating the rules,

The efficiency of DOT's state liaison effort would be enhanced if it also had the authority to provide legal interpretations of federal regulations and the scope of federal preemption.

While we are not taking a position on this matter and our analysis of the issues involved is not complete, we believe these reasons present a strong case for transferring CAB's consumer protection functions and regulations to DOT.

THE FUTURE AND SCOPE OF FEDERAL PREEMPTION

It is clear that the Congress intended to prohibit state regulation of air carrier services, but the Airline Deregulation Act does not ensure that result. If the preemption section lapses when the CAB sunsets, states could enact their own consumer protection laws and regulations covering the airline industry. This would appear to be in direct conflict with Congress' intention to deregulate the industry. No one—airlines, or consumers—are likely to be well served if this occurs. Moreover, a proliferation of state laws and regulations could possibly lead to extensive and costly litigation, as well as confusion among consumers and airlines about which laws apply to them.

Although we believe that federal preemption of state regulation should continue, it might prove beneficial to grant some enforcement authority. Even with appropriate authorizing legislation, the ability of the designated federal agency to prosecute cases of violations of federal laws and regulations governing consumer protection obligations of air carriers could be limited. A carefully prescribed enforcement role for states, perhaps parallel to provisions in federal commodity exchange laws, could augment the enforcement capacity of the designated federal agency thereby enhancing protection of consumers without sacrificing the benefits of an efficient and uniform federal regulatory mechanism.

Thus, we could support an amendment to the act that would continue federal preemption rather than allowing it to possibly lapse with CAB sunset. Such an amendment could also be used to clarify the definition of services and to designate an auxiliary state enforcement role.

JURISDICTION FOR REVIEWING CARRIER AGREEMENTS AND GRANTING ANTITRUST IMMUNITY

The 1978 Act specifically provides for a transfer of CAB's authority over carrier agreements and grants of antitrust immunity to the Department of Justice presumably because of that Department's antitrust responsibilities.

Officials from trade associations and airlines we interviewed frequently expressed concerns about this prospect, believing Justice would be less sensitive to the benefits of varied airline agreements and would not continue to grant antitrust immunity. These critics favor legislation to transfer the authority to DOT, thereby avoiding fragmentation of federal activities concerning the airline industry. They note that such an arrangement would consolidate authority over all airline agreements in one agency, since DOT is already slated to assume responsibility for reviewing and overseeing international agreements.

Advocates of transferring agreements authority to DOT also argue that as a result of DOT's responsibilities and expertise over national transportation policy, DOT would be in a better position to evaluate, monitor, and collect information necessary to grant antitrust immunity and oversee agreements. DOT and Justice disagree and support the transfer of CAB's authority over carrier agreements and grants of antitrust immunity to Justice, as provided for by CAB's sunset legislation. While we take no position on this issue, we would point out that to transfer CAB responsibilities under sections 412 and 414 of the FAA Act to DOT instead of Justice would require legislative action.

In conclusion, Mr. Chairman, we will be providing Chairman Levitas a more detailed report on the issues we discussed today.

That concludes my statement and we will be glad to respond to your questions.

Mr. MINETA. Please proceed.

TESTIMONY OF OLIVER W. KRUEGER, ASSOCIATE DIRECTOR, RESOURCES, COMMUNITY AND ECONOMIC DEVELOPMENT DIVISION, U.S. GENERAL ACCOUNTING OFFICE, ACCOMPANIED BY JAYETTA HECKER, ASSISTANT DIRECTOR, RESOURCES, COMMUNITY AND ECONOMIC DEVELOPMENT DIVISION; RICHARD SELDIN, ATTORNEY, GENERAL COUNSEL'S OFFICE; AND PAUL BOLLEA, SENIOR EVALUATOR

Mr. KRUEGER. Thank you, Mr. Chairman.

It is nice to be in front of you again. I have with me this afternoon on my left, Ms. Jayetta Hecker, Assistant Director in our Division; Mr. Dick Seldin, an attorney from our General Counsel's Office on my right; and on my far right is Paul Bollea, Senior Evaluator on this job.

We appreciate the opportunity to be here today to discuss our ongoing review of the future of the Civil Aeronautics Board's consumer protection functions. This review was undertaken at the request of Chairman Levitas of the Subcommittee on Investigations and Oversight and concentrated on three areas: One, the extent to which the plans of DOT and others provide for an orderly transfer of CAB's consumer protection functions; two, the potential changes in consumer protection should no further legislation be enacted; and three, legislative options for insuring an orderly transfer of CAB's consumer protection functions.

In a January 1980 report on CAB's sunset planning efforts, we concluded that the disposition of the consumer protection regulations was not specifically addressed in the Airline Deregulation Act. At that time, we recommended that CAB expand its sunset planning to include the development of a legislative proposal to address this gap.

Based on our current review, plans for transferring CAB's consumer protection regulations at sunset do not resolve this issue. Current planning for the transfer of CAB's responsibilities is incomplete, and views of the three agencies directly involved—DOT, CAB, and FTC—differ on which agency should assume CAB functions.

DOT's current planning suggests no further legislation is required to continue CAB's consumer protection regulations. The Department believes that DOT and the Federal Trade Commission will have authority to administer these functions and regulations under their existing statutes.

CAB, on the other hand, now favors placing authority to regulate all air transportation, including consumer protection regulations, at DOT.

In our discussion with FTC officials, they indicated that their capacity to take over CAB's consumer protection functions would be impeded by two factors. First, they believe the FTC would continue to be precluded under its act from regulating aviation matters. The FTC further believes that it would be constrained in revising existing CAB regulations or in issuing new rules, because of their formal, time-consuming rulemaking procedures.

Based on our assessment, the future of CAB's regulations is unclear. The authority of the FTC to assume the functions is questionable, and the permissible range of State actions is uncertain.

Thus, a decline in consumer protection could possibly occur, with potential for increased litigation.

The sunset provisions of the Airline Deregulation Act, including its legislative history, provide neither for the survival nor the transfer of the CAB's consumer protection regulations. Thus it is unclear in our view whether the regulations survive, and if they do, which, if any, Federal agency can enforce them.

In our opinion, specific legislation appears necessary to allow FTC to act in aviation matters. Based on our interviews, the FTC agrees that it could not absorb CAB's consumer protection functions until the statutory bar was removed. Even if the bar were removed and FTC could assume the consumer protection functions, it is questionable whether FTC could assume and enforce CAB's existing regulations without specific legislative authority to do so.

The Airline Deregulation Act of 1978 prohibits States from enacting and enforcing State laws covering services provided by air carriers having authority under title IV of the Federal Aviation Act of 1958. However, since most of title IV lapses with CAB sunset, it is unclear whether the prohibition will continue to apply. State officials we interviewed and the Air Transport Association agree that the future role of the States is unclear. These officials also believe that the situation is clouded by the uncertain status of section 404(a). As the authority under section 404(a) has not been transferred to any Federal agency, the Federal Government would be powerless to enforce it. Thus, if the Federal preemption section continued to survive, it is possible that neither the Federal Government nor the States would have legal authority to issue and enforce consumer protection regulations.

Without clarifying legislation, potential exists for unnecessary litigation concerning the respective rights and obligations of the consumers and the airlines. Officials from airlines, trade associations, State agencies, and consumer organizations that we talked with generally agree that some form of legislation is needed.

Those who support full repeal of all of the consumer protection regulations and functions believe that true deregulation requires that the Government not dictate the terms of the contract between the airlines and the passengers. Those favoring continuation of the regulations express concern that without regulations, the marketplace will not handle most areas of consumer rights adequately.

Particular areas of support for continued regulation included a continuation of CAB's rules designed to ensure unbiased computer reservation systems, limiting the advertising and sales of tickets prior to CAB's approval to operate, and to regulate charter operations. There was somewhat less agreement on the continuing need for rules on baggage liability limits and denied boarding compensation.

Given the differences, the GAO believes that the best approach is legislation transferring the consumer protection functions and regulations to another Federal agency. Under this approach, all of CAB's consumer protection functions and existing rules should be transferred intact. However, the receiving agency would have sufficient flexibility to revise, amend, and even rescind the rules.

A number of views were expressed during our interviews on where CAB's consumer protection functions should be housed.

Some favored transferring the function to FTC, while others favored continuation of the CAB. Overall, most officials we interviewed from airlines, trade associations, State agencies, and consumer organizations favored transferring CAB's consumer protection functions to DOT. While the views of these officials varied, the reasons for favoring DOT as the sole recipient agency were to avoid fragmentation of responsibilities across several agencies and to capitalize on DOT's transportation expertise.

While are not taking a position on this matter as to where they should be housed, we believe these reasons present a strong case for transferring CAB's functions and regulations to DOT.

It is clear that the Congress intended to prohibit State regulation of air carrier service, but the Airline Deregulation Act does not insure that result. If the preemption section lapses when the CAB sunsets, States could enact their own consumer protection laws and regulations covering the airline industry. No one, airlines or consumers, are likely to be well served if this occurs.

If the preemption should continue, it might prove beneficial to grant some enforcement authority to the States. A carefully prescribed enforcement role for the States could augment the enforcement capacity of the designated Federal agency, thereby enhancing protection of consumers without sacrificing the benefits of an efficient and uniform Federal regulatory mechanism.

The 1978 act specifically provides for a transfer of CAB's authority over carrier agreements and grants of antitrust immunity to the Department of Justice. Officials from trade associations and airlines that we interviewed frequently expressed concerns about this prospect, believing Justice would be less sensitive to the benefits of varied airline agreements, and would not continue to grant antitrust immunity. These critics favor legislation to transfer this authority to DOT.

DOT and Justice disagree and support the transfer to Justice, as provided for by the CAB sunset legislation.

While we take no position on this issue, we would point out that transferring CAB responsibilities to DOT instead of Justice would require legislative action.

In conclusion, Mr. Chairman, we will be providing Chairman Levitas a more detailed report on the issues we have discussed today.

This concludes my statement, and we would be glad to answer any questions.

Mr. Mineta. Thank you, Mr. Krueger.

Before we proceed, let me ask unanimous consent that the letter from Mr. Levitas to the Comptroller General be entered into the record just before the statement by Mr. Krueger.

[The letter referred to follows:]

Committee on Public Works and Transportation,
B-376 Rayburn Building,
Washington, D.C., December 15, 1983.

Mr. Charles A. Bowsher,
Comptroller General of the United States, U.S. General Accounting Office, Washington, D.C.

Dear Mr. Bowsher: In 1978, the Congress passed the Airline Deregulation Act which, among other things, provided for the Civil Aeronautics Board (CAB) to sunset on January 1, 1985. In a January 1980 letter report, GAO pointed out that the act was silent on some residual functions of CAB, particularly those involving consumer protection, which were not scheduled for transfer to other government agencies. On December 9, 1983, my subcommittee staff was briefed by GAO on ongoing follow-up work on the future of CAB's consumer protection functions. We believe the importance of this work is heightened as it appears that the disposition of these functions following CAB's sunset is still unclear. The subcommittee is concerned that if this issue is not resolved by the time CAB sunsets there may be considerable and unnecessary disruption in the basic protections air travellers are provided—whether due to a failure to provide for some perpetuation of current regulatory requirements or possible alternative mechanisms.

We would like the General Accounting Office to continue its present work on this matter with an aim toward providing the subcommittee with the following information:

(1) Identification of the current consumer protection regulations administered by the CAB.

(2) A review of the relevant directions or lack thereof for transfer of these functions in the 1978 Airline Deregulation Act.

(3) A review of the extent to which CAB and the possible receiving agencies (DOT, FTC, DOJ) have evaluated the continued relevance of these functions in a deregulated environment.

(4) An assessment of the adequacy of CAB and the receiving agencies' plans (either administrative or legislative) for assuring the orderly transfer of these functions upon sunset.

(5) A review of the potential changes in the protections airline passengers have generally been afforded should no further legislation be enacted.

(6) An assessment of the alternatives to government regulations, including the potential for consumers to seek common law solutions and the possibility and effect of state and local authorities regulating airlines should federal pre-emption be removed.

We recognize that the review is concentrating on the explicit consumer protection functions of the CAB (e.g., baggage, notice of contract terms). While we understand your capacity to broaden the focus is limited, we believe that there are important consumer protection issues related to the regulatory treatment of airline agreements (e.g., interlining, scheduling, relationships with travel agents). Some attention to the future of these functions thus may be appropriate.

As we discussed with your staff, we believe your approach of canvassing the relevant agencies, trade associations, airlines and sunset reports or legislative proposals is appropriate. In addition, we believe your effort to inquire into the fate of consumer protection functions in the deregulated environment of California, Texas and Florida should be informative and useful.

Because this issue is certain to be a focal point before the Congress this spring, it is essential that GAO conclude its work by that time so that the information obtained can be of use. The subcommittee is planning to conduct hearings on this issue during April 1984 and would like GAO to testify at that time. In addition, we would like to have a briefing on your findings and recommendations during the latter part of March 1984 to help ensure that we are able to incorporate the results of your work into the legislative process.

With best wishes, I am

Very truly yours,

ELLIOTT H. LEVITAS, *Chairman,*
Subcommittee on Investigations and Oversight.

Mr. MINETA. Mr. Krueger, first of all, I would like to commend the GAO on the thoughtfulness and the comprehensiveness of the study. It covers the full range of concerns on the issue of consumer protection, and it does not shy away from reaching conclusions on controversial issues where you have a basis for doing so. And so, therefore, the study will be of great value to the Congress as it considers these critical issues.

In your testimony, DOT implies that transferring consumer protection and antitrust immunity authority to DOT might in some way be incompatible with the goals of the 1978 Airline Deregulation Act in sunsetting CAB and ending domestic airline regulation.

Do you see any incompatibility between the goals of the 1978 act and giving DOT authority over consumer protection and antitrust?

Mr. Krueger. No, sir. I do not believe there is any incompatibility. As we understand it, the Congress intended to deregulate the economic regulations affecting the airline industry. I think that has been accomplished.

The provisions for the consumer protection provisions to continue could be housed either in DOT or FTC. I do not think they are incompatible, no, sir.

Mr. Mineta. Your testimony indicates that you interviewed State officials and they generally favored transferring CAB's consumer protection authority to DOT. Could you tell us what State officials you interviewed?

Mr. Krueger. Perhaps Jayetta can give us a little more detailed explanation on that.

Ms. Hecker. We talked with officials in California, Texas, and Florida. In each State, we spoke with the attorney general in charge of consumer affairs and the regulatory units. In two of those States, the regulatory units were not active in regulating airlines, but we spoke with officials of the regulatory commissions and the consumer affairs office in each State.

We can make a list of the officials part of the record.

Mr. Mineta. Please do submit that for the record.

[The information received from Mr. Krueger follows:]

STATE AND LOCAL OFFICIALS INTERVIEWED BY GAO DURING THE REVIEW OF CAB'S SUNSET PLANNING

CALIFORNIA

State Department of Consumer Affairs
- Deputy Director
- Supervising Attorney
- Consumer Affairs Officer

State Department of Transportation
- Chief, Division of Aeronautics

Office of the Attorney General
- Attorney General--Consumer Affairs
- Chief, Office of Community and Consumer Affairs
- Deputy, Attorney General

Public Utilities Commission
- Senior Transportation Engineer
- Manager, Consumer Affairs

Los Angeles County Department of Consumer Affairs
- Consumer Affairs Officer

Los Angeles City Attorney's Office
- Consumer Affairs Attorney

FLORIDA

State Department of Agriculture and Consumer Services
- Director of Consumer Services
- Consumer Complaint Analyst--Travel

State Department of Transportation
- Aviation Bureau Chief

Office of the Attorney General
- Director, Department of Consumer Affairs
- Assistant Attorney General--Legal Affairs

Public Service Commission
- Case Manager, Office of the Executive Director

TEXAS

Office of the Attorney General
- Assistant Attorneys General
- Consumer Analyst
- Investigator

Texas Aeronautics Commission
- Director
- Staff Attorney

Mr. MINETA. Did the State officials you talked to generally believe that CAB regulations offered important protections to airline consumers?

Ms. HECKER. Most definitely. They were the strongest supporters of the need for continued Federal regulation. They felt the regulations were an essential part of the regulatory structure and were really not actively interested in substituting Federal regulation with State regulation. They believed that Federal standards were necessary and that the CAB rules were important for protecting consumers in their States and Nationwide.

Mr. MINETA. Mr. Krueger, in your testimony you state that DOT's rationale for preferring FTC appeared to be based on their assumption that CAB's consumer protection functions can be transferred to FTC without legislation. Do you base this conclusion on interviews with DOT officials? And if so, when did the interviews take place and to whom did you talk?

Mr. KRUEGER. When we initially undertook this request, at Chairman Levitas' instigation, we met with the Department of Transportation liaison officials. We did not have any meetings after that. They, in effect, refused to meet with us to discuss their planning. Our General Counsel's Office did have some conversation with their General Counsel's Office and we did get a copy of their plan. I believe it was just last week we finally got a copy of the plan. We have had no substantive discussions with policy people in the Department of Transportation.

Mr. MINETA. When was that original interview, that you had with them?

Mr. KRUEGER. That was in November, sir.

Mr. MINETA. And then the conversations with their General Counsel's Office was when?

Mr. SELDIN. Over the past several months.

Mr. MINETA. Before November?

Mr. SELDIN. That would be January, February, March.

Mr. MINETA. Do you see any problem with splitting consumer authority, which would occur under the DOT plan? That is, DOT could enforce consumer protection for international service and essential air service, while FTC would enforce consumer protection for other domestic flights?

Mr. KRUEGER. I believe some of the witnesses you had before us this morning made the argument that the fragmentation is not good. I do not know whether GAO would want to take a specific position on whether it is good or bad. There are, of course, other programs that are fragmented. But it would seem, from our personal point of view, that it would make more sense to have it housed in one organization.

Mr. MINETA. In your testimony, you note that one of the arguments in favor of DOT, rather than FTC, administering consumer protection is that DOT can act more expeditiously. Is the concern here that FTC would be required to use the so-called Magnuson-Moss procedures for rulemaking, which require evidentiary hearings, while DOT would not be required to hold these hearings? Do you have any views on the probable time difference between rulemaking with evidentiary hearings and rulemaking without evidentiary hearings?

Mr. **Krueger**. I believe there is definitely a difference in the amount of time it takes between the two types of hearings. Perhaps my attorney can address that a little bit more. I understand the FTC told you this morning that they have done nothing in less than 2 years under Magnuson-Moss procedures.

CAB, on the other hand, or DOT even, under more liberal rulemaking procedures, could act much quicker than that.

Mr. **Mineta**. Thank you. Mr. Hammerschmidt.

Mr. **Hammerschmidt**. Thank you, Mr. Chairman, and thank you, Mr. Krueger, for your testimony.

As you point out, in your testimony, CAB's domestic consumer protection authority will not specifically transfer to any agency under present law. Does GAO have an opinion, as to whether FTC or DOT would be the best agency to handle the Board's existing consumer responsibilities?

Mr. **Krueger**. I think I said in my statement, Mr. Congressman, we do not take a position on where it should be. We believe it should be housed, possibly in one agency. Which one, I think that is a matter for the Congress to decide.

Mr. **Hammerschmidt**. The ADA provides that CAB's antitrust authority will transfer to the Department of Justice. There are those that have argued that this responsibility should transfer to DOT, as you have pointed out in your testimony. I realize that GAO has taken no official position on this issue but I would be interested in your comments relative to where overall responsibility for antitrust matters should be transferred.

Mr. **Krueger**. Would you like to handle that one?

Ms. **Hecker**. Well, certainly the Department of Justice is the lead agency in the Government for antitrust matters. However, traditionally when agencies are regulated and there are provisions for grants of immunity, that authority is given to the regulatory agency. So an argument can be made that if regulatory authority, over airlines, is going to continue past CAB sunset, the authority over agreements and the authority to grant antitrust immunity could make good sense to be given to that same agency.

We are however, as you know, not taking a position.

Mr. **Hammerschmidt**. Mr. Krueger, in your testimony on page 4 you state that absent additional legislation, the decline in consumer protection could possibly occur with a potential for increased litigation. You further state, on page 8, that GAO believes the best approach would be legislation transferring CAB's existing authority to another Federal agency. Assuming that CAB's sunset legislation transfers all consumer protection functions and regulations to DOT, does GAO believe—or could you make a statement as to whether or not the sheer size of DOT would adversely affect the consumers, ability to get appropriate relief?

Mr. **Krueger**. As I understand the DOT plan that they are currently proposing, it would set up a consumer protection organization within the Department to handle complaints. Their plan provides the FTC, of course, would handle the enforcement aspects of those complaints. If you combine the two elements and put it into one office, I do not see why DOT could not do it.

Mr. **Hammerschmidt**. In GAO's review of CAB's consumer protection functions, was the question of staffing levels examined to insure that either DOT or FTC would have a sufficent number of existing CAB employees to carry out these functions? And if so, what were your observations?

Mr. **Krueger**. I do not believe we have any specifics on the actual personnel. They have been holding those figures very close to the vest, perhaps Paul or Jayetta may have some comment on specific staffing.

Ms. **Hecker**. The only real surfacing of the future size of the consumer protection function is in the provision, in the President's budget, to transfer, I think it is, $250,000 with an unspecified number of positions to the Federal Trade Commission. It appears to us that the performance of the consumer protection functions by the Civil Aeronautics Board really consumes much more than that if you include people in the General Counsel's Office, conducting rulemakings, providing interpretations and enforcement, and the Consumer Affairs Office.

So it really spreads through, a number of units and it probably is not fully captured in that number that is projected to transfer to the Federal Trade Commission.

Mr. **Hammerschmidt**. Thank you, Ms. Hecker. GAO testified before this committee last May, relative to the changing airline industry since deregulation and particularly on the effects on small communities. Recognizing the value of the essential air service program and the communities that receive subsidized service. I would be interested in your opinion, relative to the DOT plan, to transfer the EAS program, intact, to DOT.

Mr. **Krueger**. I believe it was just a few weeks ago that we testified before Chairman Mineta on the essential air service program. Would you like to comment on that?

Ms. **Hecker**. Yes; we had issued a report subsequent to the report on the general status of airline deregulation, on the flexibility of the criteria for the selection of subsidized points. At that time, we recommended that some flexibility could improve the long term viability of the program in reaching the objective of continuing service to small communities.

We found that the way the program was running there were a number of communities that were very close to airports that were getting subsidized service because under the terms of the ADA they were required to receive it even though they could not support the service since most passengers were going to nearby hubs, getting better connections and cheaper rates. Some communities like that, it seemed to us, could be considered to be dropped from the program. I believe one even volunteered to be dropped. In contrast, there are, other communities which could benefit by receiving a temporary increase in the amount of the subsidy up front to promote the development of air service in their community. This applies where they had such a bad record of air service over time that they had the potential to increase the demand by showing that they could have reliable service and a good range of flight times.

Mr. **Krueger**. We understand the CAB currently has some proposals from some communities to do just that at this time.

Mr. **Hammerschmidt**. Thank you very much for your responses.

Mr. **Mineta**. Mr. Levitas.

Mr. LEVITAS. Thank you very much, Mr. Chairman.

Mr. Krueger, I would like to commend you and your colleagues for what I think is an excellent analysis of the situation. It is a fine report. And I think it clearly spells out, even though you do not come to that bottom line, what Congress has to do and that is essential. So let me pursue that just a moment. In your testimony, Mr. Krueger, you comment that it is at least unclear, questionable, or unlikely that after the sunset date goes in that there will be any consumer protection legislation, any preemption, or any agency that is vested with the responsibility of carrying on what CAB is doing. Is that a fair statement?

Mr. KRUEGER. That is correct, sir.

Mr. LEVITAS. That would indicate to me that if anybody in Congress would like to see some consumer protection in this area, that it is absolutely essential that there be legislation, is that correct?

Mr. KRUEGER. That is our position, yes, sir.

It is not unreasonable to assume that an agency could take up some of those functions which I think DOT is proposing in its plan. However, without legislation, they have no authority to really do that.

Mr. LEVITAS. But at the very least, in the actions of a clear congressional statement on the subject through legislation, at the very least one could anticipate not only inconvenience, some considerable confusion but years of litigation to sort out whether there was a determination of preemption, whether States had authority to act, whether FTC inherited under its overall powers the opportunity to act in this area, so at the very least you would have years of litigation?

Mr. KRUEGER. I would assume our attorney would agree.

Mr. SELDIN. It would be a very confusing situation, I think. I agree with your statement.

Mr. LEVITAS. Let's just focus on FTC for a moment.

What I am about to say has nothing to do with my general views about the Federal Trade Commission and I am serious about that, but I am not aware that the FTC given its Moss-Magnuson rulemaking requirements and given its general function in the Consumer Protection Agency, within the consumer protection function as being through the Moss-Magnuson approach, that it has any expertise or experience in dealing with a single consumer complaint type situation.

Ms. Hecker, I notice you are nodding. Is that correct?

Ms. HECKER. That is correct.

They deal with generic patterns of deception in industries. Only to a very limited degree have they even initiated rulemakings and even where they have, very, very few of those have culminated in effective rules.

So, for example, in their consumer complaint process, they do not deal with individual complaints. They may log them and notice there are a lot of problems in the funeral industry, for example but they will not arbitrate those individual complaints.

Mr. LEVITAS. That is an extremely important point you just made, that if somebody calls up and says I have taken my television set back to the ABC Television Repair Store three times and they keep charging me but it is still not working, FTC is not going to send out some people with badges or whatever to that place and say, hey, fix this person's television set. They do not deal with the individual consumer complaint in terms of getting redress in the same way that the State or municipal consumer protection agency might deal with that individual complaint.

Ms. **Hecker**. Precisely, and in contrast the CAB does function in part as an arbitrator. When they get a complaint they will usually forward it to an airline or the other involved party and it is the leverage of their potential enforcement authority that really improves their effectiveness in resolving those complaints.

That particularly is our concern about DOT's plan in trying to house a consumer protection unit within DOT without having the authority, without having that leverage to really do anything about those complaints.

Mr. **Levitas**. One last point. As I understand DOT's position, for a variety of reasons, some of which they were prepared to express to you and to us, others which they seem to be beating around the bush on, they do not want to see any legislation in this area, as I understand it.

Is that correct?

Mr. **Krueger**. That is the general understanding we have.

Mr. **Levitas**. Now let's assume for the moment, let's make the assumption that after reading DOT's testimony and what you have heard and what Ms. Dole said in your conversations, Mr. Seldin, with them, that we do nothing and the matter under DOT's theory goes to the Federal Trade Commission.

If that is the case, and we were trying to do the responsible thing, wouldn't it be appropriate for us at least to confirm that legislatively, spell out precisely what the responsibilities of the Federal Trade Commission are, spell out whether on not there will be a continuation of preemption in order to avoid the years of litigation that I am talking about?

Mr. **Krueger**. I believe that would make sense, yes, sir.

Mr. **Levitas**. Mr. Chairman, as I said earlier, with your indulgence when I made my opening comments, I think it is manifestly clear that regardless of those position you take on this thing, that we need to have some legislation if we are going to act responsibly and again, without expressing any bias one way or another about the FTC—I guess I am as down on regulation as anybody you can find around here but I do not believe that we intend to do away with the type of consumer protection that we have had under existing law for the aviation community and so, therefore, I think that we need to pass a bill, and I would propose at that proper time that we pass one and put it at DOT, where it can probably be best handled.

Mr. **Mineta**. Very good. Thank you very much for the leadership you showed in writing that letter to the GAO.

Ms. Ferraro.

Ms. **Ferraro**. Nothing.

Mr. **Mineta**. Mr. Krueger, let me just say that we have relied on GAO testimony and reports on many occasions, but I really want to commend you for the job you have done on this particular occasion. This testimony is a superb job. It lays out very clearly the pitfalls which face us, and if we fall into them, we cannot say that we were not adequately warned. So thank you very much for a truly outstanding job and thank you, Chairman Levitas, for your role in requesting these very timely studies.

Mr. KRUEGER. Thank you, Mr. Chairman.

Mr. MINETA. Next, I call on Mr. Cornish F. Hitchcock, legal director, Aviation Consumer Action Project and Mr. Donald O. Stamey, executive director, government and industry affairs, International Airline Passenger Association.

Mr. Hitchcock, the full text of your prepared statement will appear in the record at this point.

[Statement referred to follows:]

TESTIMONY OF CORNISH F. HITCHCOCK, LEGAL DIRECTOR, AVIATION CONSUMER ACTION PROJECT ON LEGISLATIVE PROPOSALS RELATING TO AIRLINE DEREGULATION AND CAB SUNSET

Mr. Chairman, members of the Subcommittee: On behalf of the Aviation Consumer Action Project (ACAP), I appreciate the invitation to be with you today to discuss the need for legislation with respect to effectuating the sunset of the Civil Aeronautics Board at the end of this year.

ACAP is the only non-profit consumer organization working full-time on aviation matters. Since its founding in 1971, ACAP has participated in numerous proceedings before the CAB, the FAA and other government bodies. We have testified before Congress, published various studies and reports and offered advice to tens of thousands of passengers. ACAP is totally supported by public contributions.

As you know, we testified earlier this month on how the Department of Transportation proposes to exercise the functions transferred to it under the Airline Deregulation Act of 1978. We spoke in favor of establishing a modal administration within DOT to handle the CAB's residual regulatory functions, rather than splitting them up among various components of DOT as the Department proposed. We also noted that if certain non-regulatory functions, such as economic analysis or international aviation negotiations, could be folded into existing DOT components and thereby reduce overlap and achieve some savings, that approach would be worth considering.

I would like to focus today on questions apart from the organizational matters we discussed with you earlier and instead focus exclusively on the desirability of legislation dealing with consumer protection issues.

Let me state at the outset that we support a clean sunset bill which takes care of some of the technical issues which have come to light since 1978. The CAB's consumer protection functions constitute one such area, and we were very pleased, Mr. Chairman, to see your discussion of the importance of this subject in your speech on sunset issues several weeks ago.

Over the years, the CAB has adopted rules in several important areas affecting the traveling public: overbooking, baggage liability, charter tours and in-flight smoking. In addition, the Board has recently proposed standards to regulate anti-competitive features of computer reservation systems, and a final rule should be issued later this year. Finally, the CAB moves against deceptive advertising and other unfair or anti-competitive practices (such as overcharging or undue delays in making refunds) on a case-by-case basis.

Most of these areas (smoking is the exception) are regulated pursuant to section 411 of the Federal Aviation Act (49 U.S.C. § 1381), which allows the Board to police "unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof." This statutory language is virtually identical to section 5 of the Federal Trade Commission Act (15 U.S.C. § 45), which allows the FTC to move against such practices by non-regulated industries. Because there is a parallel provision in the CAB's governing statute, the FTC Act forbids the Commission from taking action against CAB-regulated carriers.

The Department of Transportation recently issued a legal opinion that legislation is not needed because once the CAB goes out of existence, the FTC would be free to move against airlines for violating section 5 of the FTC Act. While that argument has some legal force to it, a failure to enact legislation can cause significant practical problems for the travelling public, and that is why we favor a bill.

First, and most importantly, the absence of corrective legislation means that the current rules expire on 31 December 1984, and the traveling public will be left in the lurch. Carefully crafted regulations, adopted and revised after years of analysis and examination of how they work, will suddenly disappear. It is true that, even if no bill is passed, passengers will be free to file complaints with the FTC in specific cases involving an airline's specific failure to disclose baggage liability limitations or the key terms of a package tour, for example, but that is a totally unsatisfactory approach. Leaving matters to such case-by-case litigation can mean that it will take years before a coherent body of law develops as to what is and is not legal. A second problem is that the FTC may decide not to take action in these areas, even if it acquires the legal authority. Finally, even if the FTC should decide to attack these problems generically by issuing trade regulations similar to the current CAB rules, such a rulemaking process could take years and waste an enormous amount of time, money and effort. Let me explain.

As we understand it, the FTC Act requires that trade rules be developed after a hybrid rulemaking process which includes evidentiary hearings similar to formal rulemaking. Without legislation, the FTC, the public and the industry could spend several years re-inventing the wheel with respect to overbooking, package tours and other issues which the CAB has already studied to death, and it has adopted workable rules that the public and the industry are used to. Moreover, even if the FTC does adopt a trade rule in a given area, there is no guarantee it would be as good as the regulations in place today.

Therefore, we recommend that Congress enact legislation which transfers intact those CAB consumer protection rules which are in effect at the end of the year, either to DOT or the FTC. There are several reasons why such an approach would be the most efficient form of preserving the current level of consumer protection.

1. It would provide continuity and consistency for the public and the industry alike.

2. It would avoid the waste of resources if only the legal authority transferred and the successor agency had to develop new rules from scratch.

3. The specific rules I mentioned have all been reexamined by the CAB since 1981 and have been found necessary to protect the public, despite the greater competition occasioned by the Airline Deregulation Act. While these rules cover important subject areas, they are minimally intrusive, as they generally put a premium on disclosure, which has always been regarded as an essential form of consumer protection in non-regulated industries.

4. I should add that transferring the existing rules as well as the legal authority to regulate would not lock the current rules into legislative concrete, as they could be changed by the new agency should the need arise.

There are two related issues here which need to be discussed, namely, which agency should inherit these functions and what should be done about the CAB's rules on in-flight smoking. Since the Board's smoking rules were not issued under section 411, the legal authority for this rule will not automatically be transferred to the FTC. Thus, if Congress decides that the FTC ought to regulate consumer protection in the airline industry, it will have to make a special legislative provision for CAB smoking regulations.

An alternative to shifting authority and rules to the FTC is maintaining existing CAB rules in DOT. Such an approach makes particular sense if a modal administration is created in DOT, as we suggested in our earlier testimony, because it consolidates all the aviation functions under one roof. A third, in-between approach would be to spell out specific no-smoking rules in legislation, (e.g., a flat ban, a requirement that all non-smokers be guaranteed a seat, or some other proposal) and then give the legal authority and existing CAB rules in other areas to FTC.

We are not so much concerned with which agency picks up the CAB's consumer protection rules and authority as we are with the need to entrust these functions to one agency, be it DOT or the FTC. Were it not for the CAB's smoking rule, the FTC would be the logical choice, since the other CAB rules are what you might call "antitrust regulations," which are similar to rules applied by the FTC to "non-regulated" industries as a means of policing the market and protecting consumers. The FTC has antitrust expertise which DOT lacks, and that is particularly important in dealing with a newly "non-regulated" industry such as the airlines.

Having said that, we recognize that Congress is not writing on a clean slate. Because the CAB's consumer protection rules have covered a lot more than unfair and deceptive practices, the public has grown accustomed to having one agency handle consumer issues affecting this industry, and there is thus considerable utility in keeping the CAB's consumer protection functions together under one roof. While the dominance of antitrust and disclosure rules among current CAB regulations suggests that the FTC is the logical successor, we would support keeping things in DOT if a modal administration is established. If, however, DOT goes ahead with its current plan to sprinkle its inherited functions throughout the Department, we are concerned that consumer protection would get lost in the shuffle, since DOT has little experience in this area. Under those circumstances, it would be better to give all consumer protection rules and rulemaking authority to the FTC, which is supposed to be more of a consumer protection agency.

Let me now turn to a separate topic involving consumer protection, and that is the desirability of legislation establishing a passenger advocacy board similar to the Citizens' Utility Board (CUB) in Wisconsin and other states. The CUB program allows ratepayers to designate $1 of their utility and telephone bills to go into a fund which pays for a public advocacy board to take part in public utility cases on behalf of the ratepayers. Persons who contribute to this fund vote for a board of directors, which hires the necessary staff. The CUB is thus fully accountable to its constituency, and it operates without using tax dollars and solely on the basis of voluntary public contributions.

The experience in the states has shown that CUB's work, and we submit that a CUB would be a good idea in the airline area. Passengers could designate on their ticket whether they want $1 of their fare to be earmarked for such a board, which could represent passenger interests in a number of ways. For instance, the board could take part in FAA proceedings regarding air safety. The board could help communities participating in the Essential Air Service Program's proceedings. It could hire staff who would help individual contributors resolve individual problems with an airline, something that the CAB does not do presently.

In short, even though traditional CAB route and rate regulation is fading into the sunset, there remain areas where organized and effective advocacy of the passenger's interests is needed. While the proposal may sound novel, I would point out that the telephone regulatory reform bill passed by the full House a few months ago contained a provision establishing a CUB for telephone users in each of the 50 states. The House is thus on record in favor of such a CUB in another industry undergoing rapid regulatory change, and we submit that a similar approach is appropriate in the airline area as well.

Thank you again for the opportunity to be with you today. We are prepared to work with the Subcommittee on this issue, and I will be happy to respond to your questions.

Mr. MINETA. Mr. Hitchcock, why don't you go ahead and proceed in your own fashion followed by Mr. Stamey; and, Mr. Stamey, at the time you testify indicate who your colleague is, as well.

TESTIMONY OF CORNISH F. HITCHCOCK, LEGAL DIRECTOR, AVIATION CONSUMER ACTION PROJECT, AND DONALD O. STAMEY, EXECUTIVE DIRECTOR, GOVERNMENT AND INDUSTRY AFFAIRS, INTERNATIONAL AIRLINE PASSENGERS ASSOCIATION, ACCOMPANIED BY DONALD T. SMITH, MANAGER, CONSUMER AFFAIRS, INTERNATIONAL AIRLINE PASSENGERS ASSOCIATION

Mr. HITCHCOCK. Thank you, Mr. Chairman and members of the subcommittee. I appreciate the invitation to be here today to discuss these issues, and I would like to focus particularly on consumer protection issues, which have been the brunt of the subject of the hearing.

I would like to make two general points dealing with the CAB's consumer protection function.

The first is, regardless of which agency inherits the functions, I believe it is important to transfer the present rules in addition to the rulemaking authority in this area.

The second point is, again, regardless of which agency inherits the functions, it is important that the consumer protection functions come under one roof to avoid public confusion.

Let me say at the outset that we agree with many of the earlier comments that were made. It is important to have legislation in this area; otherwise the public would be left in the lurch on a number of important issues come January 1: Overbooking, baggage liability, charter tours, in-flight smoking, deceptive advertising in the upcoming rule with respect to computer reservations.

The Department of Transportation issued its legal opinion, which was discussed this morning, and while a plausible legal case can be made for that view, we are not sure that is the best policy in this area because the rules do expire.

What you have is a series of unappetizing alternatives if there is no legislation. As was indicated in the question from Congressman Levitas, there might be individual consumer letters filed with the FTC which conceivably might decide to take case-by-case actions, and you end up with something of a coherent body of law, but only after several years.

Second, you have the threat that the FTC may decide that it does not want to regulate overbooking, or it does not want to regulate problems in charter tours.

And the third problem we talked about is the Magnuson-Moss Act, which as Commissioner Douglas said this morning can take anywhere from 2 to 8 years before a rule is issued.

Frankly, I am not sure that the public will sit still if it is going to take until 1993 for the FTC to devise a new rule on overbooking or nondisclosure of important elements of charter tours.

We should not be having the public, the industry, and the agency waste money reinventing the wheel in these areas when the CAB has studied these issues exhaustively and adopted a number of useful regulations.

Transferring the regulations intact to the successor agency accomplishes a number of important goals.

First, it provides continuity and consistency so the public is not confused as to what happens.

Second, it avoids the waste of resources if all of these rules have to be reissued.

Third, the rules that I have discussed, principally in the overbooking, smoking, baggage, package tours, have all been reexmined by the CAB since 1981. They have been found necessary to protect the public despite greater competition brought about by the 1978 act.

Fourth, there still is flexibility if the FTC or DOT were to decide to change the rules in light of changed circumstances in the economy and in the industry.

I would like to deal with two related questions, namely what agency should inherit the functions, and the second problem is how to handle rules issued under 404, such as smoking which are not quite the same as those issued under 411, which deals with unfair and deceptive practices.

The point we are making is that there is an argument that can be made either for FTC or DOT as the successor agency. There are choices on either side. Each side has its positive benefits. Each side has its down side. Whichever you decide, all of the consumer protection functions should be put under one roof.

We think the idea of keeping consumer protection within DOT makes particular sense if you do have a modal administration and put all of the aviation functions under one roof at DOT.

Conceivably if the administration is going to go through with its proposal not to have a modal administration and to sprinkle all of CAB's functions all over DOT, we have a separate concern, which is that the consumer protection rules might get lost in the shuffle.

DOT really does not have that much experience regulating consumer protection and it might be better under those circumstances to give all rules to the FTC, which does. I raise that issue for your consideration because I do not think it is just enough just to give the authority to DOT. I think you have to make sure that it is going to be exercised effectively.

Congress is not writing on a clean slate here. There have been regulations of this sort that the FTC issues with respect to other industries, as well as the safe and adequate service issues.

I would like to turn now very briefly to another concept which we discussed in the testimony which I think responds in part to one of the things Congressman Levitas was asking about, and that is dealing with individual complaints.

That is, we would urge the committee to consider the need for legislation establishing a passenger advocacy board, which is similar to citizens' utility boards [CUB's] in Wisconsin and a number of other States. Illinois has adopted one legislatively. Rhode Island, Oregon, Montana, and New York are considering it either through the State legislatures or through their State public service commissions.

The idea is that ratepayers can check off a dollar or more of their phone and utility bills to go into a fund that would pay for a public advocacy board that takes part in public utility cases on behalf of the ratepayers.

The contributors vote for a board of directors which hires the staff and the CUB is fully accountable, without tax dollars. It is on the basis of contributions. CUB's do work.

There are a number of things that such an agency could be involved in, for example, FAA proceedings on air safety, essential air service determinations and also helping individuals resolve individual problems with an airline.

Many times CAB problems that passengers have do not really fall in the narrow confines of the CAB rule and there is utility in having somebody who would actually go to bat for the consumer. I would note that even though it may sound somewhat novel, a proposal was included in the telephone regulatory reform bill which passed the full House a few months ago—although it got sidetracked in the other body—to establish a CUB for telephone users in each of the 50 States. It is a precedent for an industry undergoing rapid change to have the mechanism so that individual members of the public do not get lost in the shuffle.

We appreciate the opportunity to be here and the interest that the subcommittee has shown in this subject, and are willing to work with you as the matter progresses.

Thank you very much.

Mr. **Mineta**. Thank you, Mr. Hitchcock. Mr. Stamey.

Mr. **Stamey**. Good afternoon. I am David O. Stamey, executive director of government and industry affairs of the International Airline Passengers Association. Joining me today is Daniel T.

Smith, manager of our consumer affairs staff out of the Dallas headquarters.

Mr. Smith and I collectively offer more than 20 years of direct U.S. airline experience and perspective in formulating our member views of those matters before this committee today.

IAPA as a legitimate and informed voice of this Nation's flyer constituency. We appreciate the opportunity to appear before the committee to provide you with our vantage point on CAB sunset and legislation relative to that event.

By way of introduction and briefly the International Airline Passenger Association has its U.S. base in Dallas, Tex. and is a worldwide corporation providing benefit services and representation for its more than 100,000 members worldwide who reside in more than 174 countries.

For almost one-fourth of a century, IAPA has assisted its members and the traveling public in general with travel related complaints ranging from lost baggage to overbooking. IAPA would first like to reiterate our position on deregulation of the airline industry.

We believe our members and the traveling public in general are the prime beneficiaries of deregulation, because they tell us so, and in very large numbers. From the consumer's standpoint there are more flights, lower fares, a larger choice of air carriers and a wider variety of service to those points most commonly traveled.

IAPA's most recent biennial membership survey indicated the majority of U.S. respondents felt air travel had improved as a result of deregulation. The primary advantage being a wider availability of discount fares.

IAPA also views economic deregulation and consumer protection as fundamentally separate issues. We take the position that consumer protection statutes do not impact the aviation industry's basic ability to conduct business. To enter markets, to set fares, or to establish the type of services offered.

Consumer statutes give the public recourse where the services are compromised, substituted or not provided due to generally accepted practices such as overbooking or separation of passengers and bags for operational reasons. As a result, the consumer can expect conciliatory efforts on the part of the carrier without having to seek relief from the courts to resolve the matter.

Mr. Chairman, our primary issue here before the committee today is, Can and should the Airline Deregulation Act of 1978 be improved relative to consumer protection? We believe very strongly that that answer is "Yes."

As many have articulated earlier today, the no legislative option raises serious questions as to whether or not statutory provisions mandating certain consumer protections will actually exist after CAB sunset.

Consumers have little assurance that DOT's interpretation of legislative intent will not be challenged in court, and that it will indeed withstand judicial review. Protracted legal and procedural debate following sunset would be quite time consuming, expensive, and we believe unnecessary, since there is an opportunity to avoid the problem before it occurs.

The absence of a limited number of consumer protection statutes together with accompanying enforcement authority would give those carriers which are either unwilling or unable to conduct their business in good faith the unchecked opportunity to exploit passengers using all-encompassing marketing promises as the springboard to launch and maintain their operations.

Consumers and travel agents alike, have become increasingly familiar with the realities that one airline is not just as good as another when faced with common transactions such as refunding return tickets, honoring denied boarding compensation rules, and negotiating reimbursement for lost baggage.

Those carriers which have nurtured consumer confidence and elected to maintain the high standards they have established, might be tempted for competitive reasons to compromise those standards. Obviously this course of action could jeopardize the well-earned confidence in the United States commercial aviation, and have it fall prey to the universal disclaimer of buyer beware.

Mr. Chairman, let me make one thing clear. We are not endorsing reregulation. We are however, endorsing the preservation of existing consumer protection statutes and the accompanying enforcement authority. Hence, as the industry continues to evolve, the Federal Government can respond, if and when necessary.

Contrary to earlier testimony offered this morning, I would suggest that the industry, Mr. Chairman, is still groping with its trial-and-error marketing efforts, and is not by any definition mature as a function of its new-found freedoms.

A number of mature carriers, yes. Allow me to briefly review the primary areas of consumer protection which the CAB is presently responsible for. And we are both unclear and concerned as to those preservations.

Denied boarding compensation. The current rule is the 1-hour grace period notwithstanding, are generally accepted as fair when properly administered. However, passengers can wait in line at the departure gate as long as an hour, only to be told they have not met the airline's check-in limitation requirement. That they are being bumped and as a result the airline is not required to provide compensation.

This example can be, and often is a consequence of carrier staffing constraints, which improperly place the passenger at bay. For example, IAPA has documentation showing that one airline sold twice the number of confirmed tickets than seats available, and then sent a notice to the passengers advising them that the reservation had been changed to the following day at a later departure time.

In this case, no volunteers were solicited, and no denied boarding compensation was offered. Notwithstanding the prevalent abuse of multiple reservation which result in no-shows, and the corresponding economic consequence for the carriers of the lost seat. Carriers should not be permitted to simply void their obligations of reserved travel.

One last note of reality on this particular subject, and coming from the industry, sir, self-policing of this issue simply does not work.

Another issue is the domestic baggage liability limits. These rules essentially protect carriers from automatically accepting higher liability limits without judicial review.

However, passengers are often asked for original purchase receipts for lost items, the value of their property is depreciated, and in some rare instances, the airline will refuse to reimburse passengers who have apparently complied with generaly notices regarding lost bags.

On the issue covered this morning on smoking and no smoking rules. While IAPA has noted an increase in the militancy of its nonsmoking passenger, our members historically have indicated satisfaction with the present arrangement. We suspect however, that upcoming surveys will indicate a shift in this position, considering correspondence IAPA has been receiving.

And one last point dealing with charters. The establishment of escrow account requirements is a vast improvement over past practices. However, charter packages continue to be sold without allowing passengers the benefit of reading the operator/participant contract. This places the consumer at an obvious disadvantage when they must cancel or when they encounter a major change in itinerary, or a price change of more than 10 percent.

Mr. Chairman, although these are just a few examples of exceptions to the rule, and are concededly relatively rare, please also consider the domestic airlines in this country carry more than 300 million passengers in 1983, and therefore, these exceptions then represent an astounding number of consumers.

It would be tragic for the aviation industry, as well as the traveling public, if an administrative transfer of consumer protection statutes was challenged in the courts. It would be chaotic if it did not withstand the scrutiny of judicial review.

It is not our intent to reregulate or complicate matters for the industry, but to avoid burdening airlines, consumers and the civil courts with unnecessary litigation. Our goal is to avoid the creation of an environment which could be increasingly injurious to consumers and the airline industry alike.

Thank you once again for the considered attention of the committee this morning. And that concludes my prepared comments. And we are available to the committee for questions.

Mr. MINETA. Thank you, Mr. Stamey and Mr. Hitchcock. As I understand it, the position of the aviation consumer organizations which you represent is that you believe that legislation is needed to assure that CAB's current consumer protection authority will be continued after CAB sunset.

Would you agree with me that if no legislation is passed, FTC probably would not consider consumer complaints. And even if they did, years of litigation would be likely, and the outcome might be that the courts would find that no agency has authority to protect passengers on domestic flights against unfair and deceptive practices, or to insure that these passengers receive safe and adequate service.

Mr. HITCHCOCK. I would agree with that. What the DOT plan is hinged upon is the hope that a Federal judge somewhere will agree with their interpretation. And that is a rather thin reed upon which to base consumer protections for this foreseeable future, which underscores the need for legislation.

Mr. MINETA. Similarly, we might find after litigation that the regulations which CAB has on the books at the time of sunset are a dead letter after sunset. Would you agree with that conclusion, Mr. Stamey?

Mr. STAMEY. Indeed There would be no one to respond to those individual complaints, sir.

Mr. MINETA. Do you see a problem in having consumer protection for aviation split among more than one agency. For example, under DOT's original plan, DOT would have section 411 authority to protect consumers against unfair and deceptive practices on international and essential air service flights. While FTC would have the same authority for domestic flights which do not involve essential air service.

Do you think that splitting consumer protection authority this way would create problems?

Mr. HITCHCOCK. I think it would. There are a number of instances where people have more than one problem. You might be taking an essential air service flight and connecting with a domestic flight, and you have problems with both of them. You have to write to two agencies. Or you may have a problem on a single flight where you were bumped, and you're not put in a no-smoking area. You're told, "Sorry, you cannot write to one agency. You have to write to two of them."

Those are the sorts of problems which are potential. And the public has grown accustomed to having everything under one roof. Having one central agency that you can write to and that is responsible. That is why we have said, put consumer protection under one roof.

Mr. MINETA. Mr. Stamey, Mr. Smith.

Mr. STAMEY. A passenger is disrupted on a trip, and indeed there is a consequence of errors that happen as a result of that, whether it be baggage, to no boarding compensation, and delays in transfers. We likewise feel it should stay, that protection function should stay intact and go to a single agency.

Of course, that is a congressional decision. But the IAPA would have no problem believing DOT to be the logical and perhaps appropriate agency for that function to transfer intact.

Mr. MINETA. Do you handle individual complaints that a member of IAPA may have against the carrier?

Mr. SMITH. Yes, Mr. Chairman.

Mr. MINETA. Does the prospect of having to deal with multiple agencies instead of just one give you slight concern?

Mr. SMITH. It does not appeal to me.

Mr. MINETA. Is it bad enough dealing with one, that dealing with more than one would be worse?

Mr. SMITH. Exactly. The fact that the CAB is targeted to sunset at the end of this year is causing confusion among the ranks of consumers as it stands. They are not sure to go with it. In fact, some consumers—and probably a significant minority—feel that the CAB is already out of business.

Mr. MINETA. In your testimony, you point out that once FTC adopts rules, it has to go through a complicated rulemaking process known as Magnuson-Moss which includes evidentiary hearings. Commissioner Douglas testified, earlier today, that it was not clear whether Magnuson-Moss would apply to FTC amendments to CAB rules. If Magnuson-Moss procedures are required, Commissioner Douglas testified that FTC rulemaking could take several years to complete.

As I understand it, DOT is not subject to similar requirements and can undertake rulemaking on the basis of written pleadings without holding evidentiary hearings. Do either you or Mr. Stamey think that the desirability of avoiding time consuming evidentiary proceedings indicate that we should place consumer protection authority in DOT, rather than FTC?

Mr. HITCHCOCK. I think the most important aspect is making sure that it is possible to move fairly quickly, as the computer reservation example I think Mr. Hammerschmidt brought up, illustrates. CAB rules have been adopted through the informal rulemaking, just on the basis of written comment and that is one method.

Conceivably Congress could decide to make FTC rules governing airlines adopted only after notice and comment. But I think you are right that it does indicate that that is an argument in favor of DOT. I would just come back to underscore again the need for emphasizing the current rules intact and getting them over to DOT or FTC and then letting them worry about the procedures for amending them in the future. It is most important to make sure that what is on the books transfers and then consider the procedure for amending them as a separate issue.

Mr. MINETA. Mr. Stamey, do you differ?

Mr. STAMEY. No; to the contrary, we do believe that the argument is very sound, in terms of DOT being able to expedite the transfer and the handling of the consumer complaints. We see no reason to reinvent the wheel, to rebuild that expertise in terms of the consumer being able to have a knowledgeable reactionary course of recourse.

That can be done by simply transferring the CAB functions to DOT in their entirety. To be able to do that quickly makes a lot of sense. One of the concerns that we had this morning, from listening to some of the testimony, regarded the fitness determination as well. We felt this very important for the timelag that we were speaking to, from a transfer from one agency to the other. There was earlier testimony this morning, by DOT, relative to the number of denials for fitness certificates and therefore it not being a major problem. I take great exception to that, coming from the industry, looking at some of the people that are putting carrier packages together and would offer a different observation. And that is because we have seen so few denials that is because the legislation has been there intact. The parties that wanted to build an airline proved themselves fit and responsible to conduct business, did indeed realize that that rule was there, and I think that is more testimony of the rule being in place than its effectiveness as a deterrent.

Mr. MINETA. If the worst of all possible worlds occurs and we are unable to pass a bill, and it is determined that no Federal agency has authority to protect domestic airline passengers against unfair and deceptive practices, do you think that the States would try to play a greater role in consumer protection? And would your organizations be working for actions by the States?

Mr. **Hitchcock**. I think you definitely would see that kind of action on a local level. If the Federal Government says, "Sorry, we cannot do anything about that," I think States would take the initiative, not just in the unfair and deceptive practices area but probably in the smoking area as well. Most regulation of smoking, in the transportation field, is carried out by the State and local agencies.

I think that definitely is a very good possibility.

Mr. **Mineta**. Mr. Stamey.

Mr. **Stamey**. I would defer that question to Mr. Smith, who deals with the State agencies every day that contact our office for help.

Mr. **Smith**. Mr. Chairman, I have read that one—the State of Hawaii, as a matter of fact—is involved presently in litigating against a carrier for false and defective—false and deceptive trade practices in the matter of refunding.

The State of Hawaii, I have read—I have not seen any other sources—but I have read that the State of Hawaii is, in fact, litigating against the carrier for failing to provide refunds to passengers.

Regarding other consumer protection agencies, I find—this is not a criticism—I find a decided ignorance in the fact that the CAB is, in fact, still available to provide assistance to them—to the consumers or to the States. Again, this is not a matter where they had been involved for the last 40 years in the regulation of the airline industry, so one can expect the fact that they would not know what the circumstances are.

I would expect that there would be an increase in the States wanting to assert their rights to protect their consumers.

Mr. **Mineta**. Mr. Hitchcock, with respect to your proposal for requiring airlines, at the request of a passenger, to give a dollar of the fare to a passenger advocacy board, you cite, as a precedent, a provision establishing a similar program for the telephone industry. It seems to me that there is a difference in the telephone situation because State and local telephone companies are regulated monopolies and can pass these types of costs on to consumers.

The deregulated airlines do not have similar protections and do not have the benefits of exclusive franchises. What would be the justification for airlines, in an unregulated industry, to be required to divert some of their revenues to establish an advocacy board?

Mr. **Hitchcock**. In a number of respects, the airlines still remain a regulated industry. They are regulated in the same way as many other industries, however. There are still, for example, the safety determinations that the FAA makes. That has not been deregulated. Essential air service is a consideration. There are proceedings there where there might be an opportunity for public commentary.

The other factors, dealing with individual complaints, helping people resolve particular matters, collecting information on consumer problems. There are some options there. It is a little different dealing with multiple member industry than just a simple telephone company or a single power company, I admit. But the issues, and the concerns from individuals, I think, are just as great.

Mr. **Mineta**. Mr. Hammerschmidt.

Mr. **Hammerschmidt**. Thank you, Mr. Chairman.

Mr. Stamey, in your testimony you stated, on page 5, that IAPA members have indicated satisfaction with present smoking regulations. Further, you state that upcoming surveys will indicate a shift in this position. Based on the correspondence you have been receiving, could you tell us what has caused the shift in this opinion? And does IAPA have an opinion on the CAB's pending proposals relating to smoking aboard aircraft?

Mr. **Stamey**. The militancy issue, which I related to, is one that is subjective, one that comes from our consumer affairs office, as our passengers throughout the world complain. When I indicate that they have satisfaction with the present arrangements, that is the seating segregation on the airplanes, that was as the result of a survey 2 years ago.

We have a survey in the field today. All of our members, 100,000 of them, are being asked again to take a definitive position on smoking or no smoking, whether it is adequate, whether they would want to change, and how they would want it changed. We do not have the luxury of bringing those results to this committee today. Those results will not be in before the middle of May.

Mr. Smith, again, deals with our passengers, our consumers, that call in, that have indeed indicated a strongness—in many instances—being denied a seat or having to go through a hassle on the airplane of displacing, if you will, a nonsmoking passenger for a smoking passenger. I think there is probably more, sir, an awareness of the traveling public that they do indeed have those rights, to be segregated smoking and no smoking and feel very strongly about that and are willing to speak out to that issue.

That is what we are saying through our membership.

Mr. **Hammerschmidt**. I wonder if you would comment further, if you have an opinion, on CAB's pending proposals relating to smoking aboard aircraft.

Mr. **Smith**. Since we try to represent or echo the sentiments of our members, it would be inappropriate for us to say either way, sir. I'm sorry.

Mr. **Stamey**. We are waiting for that to come back from our members, so we can speak for them.

Mr. **Hammerschmidt**. Are the surveys related only to smoking regulations or do they cover other areas of consumer protection?

Mr. **Stamey**. Those particular surveys cover every aspect of air traveling, from ground handling, inflight, to the service they get, to the issue of whether they were given a proper price, whether they were accorded, in terms of getting the proper fare. Simply an all-encompassing type of a measurement to our members, that say are you getting what the airline or the travel agent holds out, in terms of the price and a condition of carriage.

One important point that was made a few moments ago, we are strongly opposed to any position in the industry that would cause to come about a consumer advocacy protection group that indeed, the traveling public had to fund in addition to their trip package. We believe that is inherently a part of the condition of travel, that indeed their voice, their ability to have recourse should be included in the price of the ticket and not be charged extra for it.

Mr. **Hammerschmidt**. I believe I heard you say you expect those surveys to be completed about mid-May and I suppose that this committee, and perhaps the House, will have taken some sort of action by then. At the time that it is appropriate, recognizing the need to protect your own customers' interests, I think it would be very helpful to this committee if we could have the results of your findings. Would you be willing to supply us with that?

Mr. **Stamey**. We would be delighted.

Mr. **Hammerschmidt**. Mr. Hitchcock, with regard to the CAB's rules on inflight smoking, you state in your testimony, on page 6, that one alternative would be to maintain existing CAB rules on inflight smoking in the Department of Transportation. Would you support transferring section 404(a), which includes inflight smoking regulations, to DOT, even if FTC was given the authority over unfair and deceptive practices, under section 411?

Mr. **Hitchcock**. We would prefer putting it all in one place. I was making that suggestion as much for thoroughness as anything else, because of the problem that so many of the CAB's functions and rules are in the 411 area, as opposed to the 404 area.

And it might be easier simply to have one regulation, if you do not want to put everything in one house or the other. So it is made for completeness rather than some kind of strong recommendation.

Mr. **Hammerschmidt**. Let me ask Mr. Stamey one last question. What is IAPA's position with regard to DOT's plan to establish a new Office of Consumer Affairs in the Department of Transportation, to receive and respond to airline consumer complaints and questions. My real question is, Do you think it is a good idea, regardless of whether or not legislation is enacted?

Mr. **Stamey**. Yes; we do. We feel very strongly that that is necessary and needed.

Mr. **Hammerschmidt**. Thank you, very much. Thank you for your responses, gentlemen.

Mr. **Mineta**. Mr. Levitas.

Mr. **Levitas**. I really do not have any questions, Mr. Chairman. I appreciate the testimony and thank these witnesses, who have made a significant contribution to our hearings.

Mr. **Mineta**. Ms. Ferraro.

Ms. **Ferraro**. I am always intrigued by the Department of Transportation's assumption that you do not have to give them authority through legislation, that somehow they are capable of dealing with the situation only brought out in your testimony. It is the same problem we are running into with reference to DOT's ability to eliminate tandem trucks from interstate highways, now that we have passed the interstate bill.

If a consumer were to bring an action against an airline before DOT, without legislation, and whoever it was in DOT who was making the determination found the airline at fault, the airline could proceed in court and have the decision thrown out.

Where would that leave the consumer?

Mr. **Hitchcock**. High and dry.

Ms. **Ferraro**. To start another action someplace?

Mr. **Stamey**. Civil court.

Mr. **Hitchcock**. DOT has said the consumer protection function goes to the FTC, it is all the FTC's problem. As for a lot of the other rules not dealing with consumer protection, they—DOT—have authority to deal with it.

I think your question does underscore one point that is needed here, which is, rather than just let DOT have a blank check to figure out how it wants to exercise authority, it is useful for Congress to spell out how it is going to exercise the various authorities it is going to have.

We testified at the last round of hearings in favor of putting in various functions within a particular modal administration like the FAA and NHTSA and some of the other administrations, because that is really where rules are made within DOT and where the enforcement comes, not in the Office of the Secretary, which is sort of a policymaking body that does not really have that much direct, hands-on regulatory experience. And that is what DOT has proposed.

Ms. FERRARO. They also have said with reference to smoking regulations in the testimony before the subcommittee that the marketplace will insure that there will be nonsmoking seats and that regulations really are not needed.

Now that is probably true. But the issue, I think, is much, much larger than that and more complex than whether or not there will be seats available. You have to look at whether or not there will be conditions attached to it. Do you have to make the reservation? Do you have to ask for a nonsmoking seat at the time of making a reservation?

Mr. HITCHCOCK. If I can respond to that, we disagree with DOT that the marketplace will work.

Back before the rules were adopted in 1973, there was a situation where the airlines could not compete by cutting their fares, and they did compete by offering a lot of service, and the airlines individually were all over the map in terms of what their smoking policies were. Some did set aside seats; some did not; some did only on selected flights. And there was a lot of confusion, which is why CAB stepped in and adopted the rules.

I think one of the reasons why the system works as well as it does now is that you do have a single rule, and the airlines do know that the CAB can fine them if they violate the rules. And that is what makes the system work as it does.

The second problem is one that the chairman asked about. I think if you do away with the smoking rules and let the marketplace work, State legislatures may decide to step in. For example, the New York State Legislature may pass one rule; the Georgia State Legislature might pass another rule. And that makes it difficult for the industry to figure out how they're going to operate between New York and Georgia. We have not researched that fully, but that is a consideration if the Secretary is right, that DOT really can—the Federal Government cannot do anything in that area.

Ms. FERRARO. The beauty of the regulation is uniformity of protection in a situation where you do not want the marketplace to make the decision, because you would have various types of regulations coming from the various airlines or restrictions coming from the various airlines.

But in addition to that, you have the same problems when you leave it to the States. The lack of uniformity would be absolutely incredible. I should think it would be a tremendous burden on a consumer to try to find out who does what where.

Mr. **Hitchcock**. And what the different State laws are, whether airlines have different policies. You are dealing with companies that tend to operate in a number of different States, and there is a lot of utility in having uniformity, so the public knows there is one rule regardless of which airline you fly. That is one of the benefits of having a rule.

Ms. **Ferraro**. I certainly appreciate your testimony.

Mr. **Stamey**. I might add an industry observation on that point. That particular rule is very difficult to administer, even after all of these years, on board and in flight service. It is something from my own personal view of being in the industry. If that rule were not there, I can draw an analogy very quickly that says the consumer could find a different set of conditions on every airplane in every airport, every place he departed from. It is an extremely difficult procedure to manage, to leave an adequate number of seats available, because of the bookings, because of the no-show factor, because of the no-shows. It is one today that the industry does a very good job policing and enforcing because the rule is there.

Ms. **Ferraro**. Thank you very much for your testimony.

Mr. **Mineta**. Mr. Stamey, Mr. Hitchcock, and Mr. Smith, thank you very much for your presentation here today.

Mr. **Hichcock**. Thank you, Mr. Chairman.

Mr. **Mineta**. I would like to call on next the panel made up of Mr. J. Donald Reilly, the executive director of the Airport Operators Council International and Mr. Charles Barclay, the executive vice president of the American Association of Airport Executives.

The full text of your prepared statements will appear in the record at this point.

[Statements referred to follows:]

TESTIMONY OF THE AIRPORT OPERATORS COUNCIL INTERNATIONAL ON SUNSET OF THE CIVIL AERONAUTICS BOARD AND ITS IMPLICATIONS FOR THE NATION'S SCHEDULED AIR SERVICE

Mr. Chairman and Members of the Subcommittee: I am J. Donald Reilly, Executive Director/Secretary General of the Airport Operators Council International (AOCI). AOCI is the association of those governmental bodies that own and operate the principal airports served by the scheduled airlines in the United States. U.S. member airports annually enplane more than 90% of the domestic and virtually all of the U.S. international scheduled airline passenger and cargo traffic. In addition, our members operate many reliever and other general aviation airports throughout the nation which supplement the larger airline airports in their communities and regions. (Attachment A)

On behalf of our U.S. membership, we are pleased to have the opportunity to testify on some of the important issues that must be legislatively resolved before the Civil Aeronautics Board sunsets at the end of this year. In brief, our members believe that the enactment of sunset legislation is needed because there are some areas where free competition by domestic carriers in the marketplace will not adequately protect the interests of consumers and of smaller or isolated communities. As in 1981 when we testified here on "early" CAB sunset legislation, AOCI urges Congress to supplement marketplace forces with the necessary minimum of protective Federal regulation.

Airport operators' interests in sunset issues may be viewed from two prospectives. First, airport operators, as governmental proprietors, are responsible for providing and operating safe and efficient airport facilities for the benefit of travelers, communities, airlines and other users of the air transportation system. Secondly, airport operators locally take a leading role in seeking the improvement of their community's scheduled air service. The importance of each community's secured link to the air transportation system cannot be underestimated, for it directly affects the community's total economic and social development.

AOCI, then, has great interest in "sunset" legislation to assure (1) that Congress does enact sunset legislation this Session to fill the critical gaps left unresolved in the Airline Deregulation Act of 1978; and (2) that airports' historical proprietary powers and rights are not impinged upon in the legislative process.

1. DOT Must Be Required to Continue to Collect Airline Traffic Data so Market Forces Can Operate With Adequate Information—

Our members are convinced that the CAB sunset law must mandate the continued collection by DOT of those basic airline traffic statistics that have, since 1959, been the data source of airport proprietors' efforts to market their communities and to convince carriers of new marketing opportunities.

DOT has recently acknowledged that section 407 of the Federal Aviation Act, under which CAB currently collects origin and destination (O&D), service segment and airport activity statistics, will lapse for domestic air service unless Congress enacts sunset legislation. We are concerned that DOT's own current statutory powers are not precise enough to obviate the need for retaining section 407. Also, in this Administration's last sunset bill, it wanted flexibility to eliminate the collection of any data not required for the Federal Government's own purposes. Section 407 data, however, most importantly provides valuable traffic flow information to other airlines and airports and this results in a more informed marketplace.

Unless Congress mandates the continuous collection of this data, DOT could decide to no longer require their collection. In this event, that information simply will not be available to airport planners because some airlines have already indicated that they will refuse to supply such data to any governmental or private entity for public availability purposes unless required to do so by Congress. In short, some airlines simply want protection from the threat of competition that might follow upon the dissemination of this traffic information.

A program of mandated data collection does not contradict the spirit of deregulation because increased information to communities, consumers and potentially-competitive airlines would enhance the post-sunset operation of free market forces. However, without actual data, airport planners and airline marketing personnel alike would be limited to more costly but less valuable "guesswork" in the planning of new airline services.

A detailed description of the kinds of traffic data that should be continued is attached to our testimony as is draft language to retain section 407.

2. Because Market Mechanisms are Imperfect, Smaller Communities Need a Federal Forum to Question "Unjustly Discriminatory" Fares by Monopoly Air Carriers—

AOCI urges the transfer to DOT of section 404(b) of the Federal Aviation Act so that a community, regional airport or state could question whether an extremely high fare charged by a monopoly airline should be investigated by the Federal Government to determine whether that fare is "unjustly discriminatory" and a clear gouging of passengers in a captive market.

We do not favor changing the existing law so that equal fares must be charged for flights of the same distance or to allow DOT or Federal courts to set fares. Only airlines should set fares. Clearly, the complexities of different airline pricing strategies, market characteristics, cost elements and other factors argue against fare standards based upon industry generalizations, and such a direction would be counter productive to the benefits that have resulted in many markets from the deregulation of air fares.

Under DOT's "no sunset bill" plan, however, a community whose passengers were truly being gouged by an airline's desire to maximize monopoly revenues so as to cross-subsidize fares in its competitive markets has no recourse under Federal law. While that local government could "grieve" to its Congressional delegation or write to the Secretary of Transportation, no Federal agency could do anything but listen politely. The DOT Secretary couldn't even look into the merits of the community's complaint.

In our view, the highly variable treatment of communities by carriers in their pricing policies, and the potential for abuses in monopoly markets, points to the need for some form of continuing air fare oversight by DOT. The absence of any statutory protection would limit aggrieved communities to trying—generally in vain—to attract a second airline to compete at a lower fare in markets that, because they are too thin to support two carriers, gave rise to the opportunity for the charging of discriminatorily high fares by the monopoly incumbent carrier.

Fare deregulation has, as suggested above, resulted in serious problems for travelers from many communities where discount fares have not been available or where service in particular markets has been provided by only one carrier. This is increasingly the case in medium or small sized cities, and has brought allegations of discriminatory pricing practices in those locations. Travelers originating their travel in a small hub often must travel long distances in the "wrong" direction to obtain some benefit from discount fares available only at larger cities. Monopoly markets are increasingly characterized by high air fares charged by carriers based upon a "take it or leave it" philosophy. The fact that some two-hundred mile trips cost more than transcontinental trips has raised the question at many smaller communities of the cost-relatedness of their air fares.

For this reason, AOCI proposes simply that a community be able to require DOT to determine whether an extremely high fare is "illegally high" (unjustly discriminatory) as without any basis in cost. And, particularly in markets where a de facto monopoly exists, communities need some right of judicial review. AOCI members also understand the carriers' historical reluctance to have District Court judges or the Federal Government set fares and to have communities be able to litigate a fare without any intermediate review by a Federal agency with understanding of the carriers' needs for full fare flexibility and the ability to attempt promotional and innovative pricing.

The attached AOCI draft amendment asks for neither of these. The amendment attempts to meet the carriers' objections while reserving to communities the ultimate right for a hearing on a fare discrimination issue of major import to their metropolitan areas. The difference is procedural, as the amendment would simply give a civic party access to Federal court only upon the refusal of the Secretary of Transportation administratively to investigate the plaintiff-community's claims or from an adverse ruling from the Secretary.

3. Section 419's 10-year Essential Air Service Subsidy Program Needs A Mid-Course Statutory Infusion of "Flexibility"—

As part of a comprehensive deregulation package, Congress guaranteed that all small communities with scheduled air service on the date of enactment of the Airline Deregulation Act of 1978 would be guaranteed "essential air service" (generally two round trips each weekday in commuter aircraft to the nearest hub) throughout the ensuing decade even if Federal subsidy were required.

Testimony at this Subcommittee's hearings on the EAS program in Modesto, California last August 16, and here on January 31–February 1, convinced us that existing Section 419 needs to be amended in the CAB sunset bill.

Unless the statute is amended now to give DOT greater programmatic flexibility to respond to community needs than CAB has had, we fear that: (1) today's rigid EAS program will become increasingly irrelevant to the air service needs of smaller communities over the next few years; (2) Congress will not have developed any basis for determining whether any parts of the EAS program should be modified and continued after 1988; and (3) virtually all communities assisted by the EAS program will lose all scheduled service the day Federal subsidy expires.

Because only 100 of 550 eligible communities are now receiving EAS subsidy under existing statutory criteria and subsidy levels are now down to $38 million, both DOT and CAB are extremely reluctant to propose revisions to the EAS program during sunset negotiations for fear of alerting smaller communities in rural America to the possibilities of improved air service but at higher subsidy levels.

Mr. Chairman, AOCI believes a more flexible EAS program need not be more expensive than an inflexible one.

The General Accounting Office's recent study ("More Flexible Eligibility Criteria Could Enhance the Small Communities Essential Air Service Subsidy Program" GAO/RCED-83-97 May 18, 1983) concluded that:

a. The essential air service program could be more cost effective and have more long term value if the Act's eligibility criteria were made flexible enough to allow higher "up-front" subsidies to some (perhaps only a few) communities for the purpose of developing viable self-supporting markets but with those communities legally waiving their rights to further subsidies if the experiments prove unsuccessful.

b. Some communities that are EAS-ineligible may have greater justification for EAS support than many of those "grandfathered" in as of October 24, 1978.

c. Congress may wish to consider withdrawing its 10-year guarantee from some communities that have weak justifications for continued subsidy and transferring those funds to other currently EAS-ineligible communities.

AOCI agrees with most of the GAO conclusions but urges the Subcommittee not to withdraw the 10-year guarantee from any community. Congress' word must be kept even if there is a cost. We do, however, support amendments to section 419 to authorize and direct DOT to experiment with "front loading" and changes to today's EAS eligibility criteria so that the results of its experiments can provide an informed basis for Congress' later determination as to whether any EAS-type program should be authorized beyond 1988. We will shortly be supplying a draft amendment to section 419 to your staff. In sum, AOCI believes that any CAB sunset bill must provide mid-course improvements to the EAS section of the Federal Aviation Act.

4. Federal Authority for Air Traveler Consumer Protection Regulation and Determinations of New Entrant Economic and Management Fitness Must Not Fade Away at Sunset—

Briefly, AOCI believes that the case for ensuring continuation of existing CAB consumer protection authority and current consumer protection regulations under sections 404(a) and 411 of the Federal Aviation Act after sunset was presented convincingly in the Chairman's January 17 address to the International Aviation Club of Washington. In our view, overbooking rules, denied boarding compensation, lost luggage liability and protection for charter passengers are issues on which the domestic air traveler expects the Federal Government to offer both regulatory protection and an enforcing Federal agency attuned to and knowledgable about air transportation operations.

5. Federal Preemption Must Not Impinge on Airport Proprietor Retained Rights and Powers—

Section 105 of the Airline Deregulation Act established a workable division of responsibilities between the Federal Government and local governmental airport proprietors during the phasing-out of airline regulation. As the Federal Government backed away from regulation of the airline industry, it rightly didn't want State and local governments jumping into the void and becoming mini-CAB's for air service or air fare issues (section 105(a)).

However, Congress wisely also affirmed existing statutory and case law by recognizing in section 105(b) that:

"Proprietary Powers and Rights

"Nothing in subsection (a) of this section shall be construed to limit the authority of any State or political subdivision thereof or any interstate agency or other political agency of two or more States *as the owner or operator of an airport served by any air carrier * * * to exercise its proprietary powers and rights.*" (Emphasis added)

In our view, that provision has worked well and must be continued without change in any CAB sunset bill. Under sections 102 and 103 of the Act, airport proprietors are helping all new airline entrants to lease available ramp space and terminal area facilities either from the airport proprietor or, where all space is already leased, from incumbent tenants through sublease.

There are, however, some real Federal preemption issues involved in the CAB sunset equation. We assume that any reduction in Federal agency responsibilities under sections 401(d), 404(a) and 411 for protecting the public (such as consumer protection regulations) will not affect airport proprietors' rights to protect themselves and their communities under section 105(b). For example, any shrinkage of the Federal financial "fitness" test under section 401(d) of the Act as to the financial responsibility of new carriers must not preclude an airport proprietor's right to continue to require under section 105(b) in a non-discriminatory manner that all airlines, including all new airline entrants, meet local conditions for reasonable insurance, bonding and escrowed landing fee and space rental payments. Finally, airport proprietors assume further, Mr. Chairman, that after "sunset" they will be able to contractually require carriers under section 105(b) to provide whatever traffic data DOT may no longer require to be supplied on a national basis under section 407.

6. EAS and International Route Awards Must be Insulated from Partisan Political Influence—

In conclusion, Attachment E to our testimony is a summary of all AOCI issues involved in sunset legislation and articulates, in part, our concern, shared by all aviation interests, for adequate insulation for the DOT decision-making process in the awards of international routes and with regard to the EAS program.

Thank you. We would be pleased to respond to your questions.

[Attachment A]

AIRPORT OPERATORS COUNCIL INTERNATIONAL ROSTER OF MEMBERS

The Airport Operators Council International (AOCI) is the association of the primarily local governments that own and operate the principal airports served by the scheduled airlines in the United States and around the world. AOCI member airports annually enplane more than 90% of the total domestic and virtually all of the U.S. international scheduled airline passenger and cargo traffic. Worldwide, AOCI international member airports enplane two-thirds of all airline passengers on six continents. AOCI represents only its United States membership in testimony before Congress and in appearances before Executive Branch agencies.

U.S. MEMBERS

Alabama: Birmingham—Department of Aviation.

Alaska: Alaska[1]—Department of Transportation and Public Facilities—City and Borough of Juneau.[1]

American Samoa: Government of Pago Pago.[1]

Arizona: Phoenix[1]—Aviation Department. Tuscon[1]—Airport Authority.

California: Bakersfield—Kern County Department of Airports. Burbank—Burbank/Glendale/Pasadena Airport Authority. Fresno—City of Los Angeles[1]—Department of Airports. Oakland—Board of Port Commissioners. Palm Springs—City of Riverside—City of Sacramento—County of San Diego[1]—Unified Port District. San Francisco[1]—City and County of San Jose. City of Santa Ana—Orange County Airport. Santa Barbara—Municipal Airport. Stockton—San Joaquin County.

Colorado: City of Colorado Springs. Durango-La Plata[1]—County Airport. City and County of Denver.[1] Pueblo—Memorial Airport.

Connecticut: Windsor Locks[1]—Connecticut Department of Transportation.

District of Columbia: Washington[1]—Metropolitan Washington Airports.

Florida: Daytona Beach—Regional Airport. Fort Lauderdale—Board of Broward County Commissioners. Fort Myers—Lee County Airport, Gainesville—Regional Airport. Jacksonville[1]—Port Authority. Melbourne—Airport Authority. Miami[1]—Dade County Aviation Department. Naples—Municipal Airport. Orlando[1]—Greater Orlando Aviation Authority. Palm Beach[1]—Board of County Commissioners. City of Pensacola. St. Petersburg-Clearwater[1]—International Airport. Sarasota-Manatee—Airport Authority. Tampa[1]—Hillsborough County Aviation Authority.

Georgia: Albany—Albany-Dougherty County Airport. Atlanta[1]—Department of Aviation. Savannah—Airport Commission.

Guam: Government of Guam.[1]

Hawaii: Honolulu[1]—Department of Transportation.

Illinois: Chicago[1]—Department of Aviation. Moline—Rock Island County Metropolitan Airport Authority. Peoria—Greater Peoria Airport Authority. Rockford—Greater Rockford Airport Authority. Springfield—Airport Authority.

Indiana: Fort Wayne—Board of Aviation Commissioners. Indianapolis[1]—Airport Authority. South Bend—St. Joseph County Airport Authority.

Iowa: Cedar Rapids. Des Moines—Department of Aviation. Mason City—Municipal Airport Commission.

Kansas: Topeka—Metropolitan Airport Authority. Wichita—Airport Authority.

Kentucky: Lexington—Lexington-Fayette Urban County Airport Board. Louisville—Regional Airport Authority of Louisville and Jefferson County. Paducah—Airport Corporation.

Louisiana: Baton Rouge—Greater Baton Rouge Airport District. Lafayette—Airport Commission. New Orleans[1]—Aviation Board. Shreveport—Airport Authority.

Maine: City of Bangor.[1]

Mariana Islands: Saipan[1]—Bureau of Transportation. Saipan[1]—Mariana Islands Airport Authority.

Maryland: Maryland[1]—State Aviation Administration.

Massachusetts: Boston[1]—Massachusetts Port Authority. Hyannis—Barnstable Municipal Airport.

Michigan: Detroit[1]—Board of Wayne County Road Commissioners. City of Flint.[1] Freeland—Tri-City Airport Commission. Grand Rapids[1]—Kent County Aeronautics Board. Jackson—County Airport-Reynolds Field. Kalamazoo—Municipal Airport. Lansing[1]—Capital Region Airport Authority. Muskegon[1]—County Airport.

Minnesota: Minneapolis-St. Paul[1]—Metropolitan Airports Commission.

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[1] U.S. International Airport.

Mississippi: Gulfport [1]—Gulfport-Biloxi Regional Airport Authority. Jackson—Municipal Airport Authority. Laurel/Hattiesburg—Pine Belt Regional Airport Authority.

Missouri: City of Columbia. Kansas City [1]—Aviation Department. St. Louis [1]—Airport Authority. St. Louis County—Spirit of St. Louis Airport. Springfield—Municipal Airport Board.

Montana: Great Falls [1]—International Airport. Missoula—County Airport.

Nebraska: Lincoln—Airport Authority. Norfolk—Karl Stephan Memorial Airport. North Platte—Airport Authority. Omaha—Airport Authority.

Nevada: Las Vegas [1]—Clark County Department of Aviation. Reno [1]—Airport Authority of Washoe County.

New Hampshire: Manchester—Airport Authority.

New Jersey: Trenton—Mercer County Airport. Atlantic City—Airport Utility.

New Mexico: City of Albuquerque.[1]

New York: Binghamton—Broome County Airport. Buffalo [1]—Niagara Frontier Transportation Authority. New York [1]—Metropolitan Airports Authority. New York [1]—Port Authority of New York and New Jersey. Syracuse [1]—Department of Aviation. White Plains—Westchester County Airport.

North Carolina: Asheville—Regional Airport Authority. City of Charlotte. Greensboro-High Point—Airport Authority. Raleigh—Raleigh-Durham Airport Authority. Winston-Salem—Airport Commission of Forsyth County.

Ohio: Akron-Canton—Regional Airport. Cincinnati [1]—Kenton County Airport Board. City of Cleveland.[1] Columbus [1]—Port Columbus International Airport. Dayton [1]—Department of Aviation. Toledo-Lucas County—Port Authority. City of Youngstown.

Oklahoma: Oklahoma City—Airport Trust. Tulsa—Airport Authority.

Oregon: Port of Portland.[1]

Pennsylvania: Lehigh-Northhampton—Airport Authority. Middletown [1]—Pennsylvania/DOT Bureau of Aviation. Philadelphia [1]—Department of Commerce. Pittsburgh [1]—Greater Pittsburgh International Airport.

Puerto Rico: San Juan [1]—Puerto Rico Ports Authority.

Rhode Island: State of Rhode Island—Division of Airports.

South Carolina: Charleston [1]—County Aviation Authority. Columbia—Metropolitan Airport. Greenville-Spartanburg—Airport Commission.

Tennessee: Chattanooga—Municipal Airport. Knoxville—Metropolitan Airport Authority. Memphis-Shelby County [1]—Airport Authority. Nashville—Metropolitan Airport Authority.

Texas: City of Austin. City of Brownsville.[1] Dallas [1]—Department of Aviation. Dallas/Fort Worth [1]—Regional Airport Board. City of El Paso.[1] Harlingen [1]—Valley International Airport. City of Houston.[1] San Antonio [1]—Department of Aviation.

Utah: Salt Lake City [1]—Airport Authority.

Vermont: Burlington [1]—Airport Commission.

Virginia: Newport News [1]—Peninsula Airport Commission. Norfolk [1]—Port and Industrial Authority. Richmond—Capital Region Airport Commission.

Virgin Islands: St. Thomas [1]—Virgin Islands Port Authority.

Washington: Seattle [1]—Port of Seattle [1]—King County Airport (Boeing Field). Spokane [1]—Airport Board.

Wisconsin: Janesville [1]—Rock County Airport. La Crosse [1]—Municipal Airport. Madison—Dane County Regional Airport. Milwaukee County [1]—Department of Public Works. Oshkosh—Wittman Field Airport. Rhinelander/Oneida—County Airport.

Wyoming: Casper—Natrona County International Airport. Cheyenne—Airport Authority. Rock Springs—Sweetwater County Airport Authority.

AOCI NON-U.S. MEMBERS

Australia: Cairns—Port Authority. Canberra—Department of Transport.

Austria: Vienna—Airport Authority.

Bermuda: Hamilton—Ministry of Marine and Air Services.

Brazil: Brasilia—Empresa Brasileira de Infra-Estructura Aeroportuaria (INFRAERO).

Canada: Ottawa, Toronto & Montreal—Transport Canada.

Chile: Santiago—Civil Aeronautic Ministerial Department.

Denmark: Copenhagen Airports Authority.

Dominican Republic: Santo Domingo—Aeropuerto Internacional de Las Americas.

El Salvador: San Salvador—Comision Ejecutiva Portuaria Autonoma.

England: London—(British Airports Authority) Heathrow, Gatwick & Stansted. Scotland—Aberdeen, Edinburgh, Glasgow & Prestwick

France: Paris—Aeroport de Paris.

Germany: Cologne/Bonn—Flughafen Koeln/Bonn GmbH. Dusseldorf—Flughafen Dusseldorf GmbH. Frankfurt/Main—Flughafen Frankfurt/Main Aktiengesellesschaft. Hamburg—Flughafen Hamburg GmbH. Hannover—Flughafen Hannover Langenhagen GmbH. Munich—Flughafen Munchen GmbH.

Haiti: Port-Au-Prince—Aeroport International Francois Duvalier.

Hong Kong: Hong Kong—Civil Aviation Department.

Iraq: Baghdad—State Organization of Roads and Bridges.

Ireland: Dublin—Aer Rianta/Irish Airports Authority.

Jamaica: Kingston—Airport Authority of Jamaica.

Israel: Tel Aviv—Israel Airports Authority.

Italy: Milan—Societa p. Az. Esercizi Aeroportuali (SEA). Rome—Aeroporti di Roma S.p.A.

Japan Osaka—Kansai (Osaka) International Airport Terminal Building Co. Ltd Tokyo—Japan Airport Terminal Company, Ltd.

Korea: Seoul—Korea International Airports Authority.

Mexico: Mexico City—Aeropuertos service Auxiliares (ASA). Mexico City—Direccion General de Aeropuertos (DGA).

Netherlands: Amsterdam—Schiphol Airport authority.

Netherlands Antilles: Saint Maarten—Juliana International Airport.

New Caledonia: Noumea—Chambre de Commerce et d'Industrie.

New Zealand: Wellington—Ministry of Transport.

Nigeria: Lagos—Nigerian Airports Authority.

Philippines Manila—Bureau of Air Transportation.

Portugal: Lisbon—Aeroportos e Navegacao Aerea (ANA).

Saudi Arabia: Jeddah, Riyadh & Eastern Province—International Airports Projects.

Sri Lanka: Colombo—Airports Authority of Sri Lanka.

Switzerland: Zurich—Civil Aviation Department.

Tahiti: Papeete—Societe D'Equipement de Tahiti et des Iles.

Taiwan: Taipei—Civil Aeronautics Administration.

Thailand: Bangkok—Airports Authority of Thailand.

Venezuela: Caracas—Instituto Autonomo Aeropuerto Internacional de Maiquetia.

[Attachment B]

DATA COLLECTION PROGRAMS RECOMMENDED FOR STATUTORY TRANSFER TO DOT

(a) The origin, destination and service segment statistics compiled by CAB represent an invaluable data bank of the overall volume of air traffic, especially as represented by the number of passengers carried on flight stages between two cities. The Board has published quarterly data in a series of air passenger origin-destination survey statistics since 1959. Although the scope of the survey has altered slightly over the years, sufficient time has now passed during which consistent O&D data have been collected so that a reliable series exists for use in demand analysis, community air service analysis, and essential air service level determinations.

Origin and destination and service segment data also provide a geographical breakdown of air travel pertinent to many air passenger forecasting efforts, both on the macro and micro scales. They can enable the aviation planner to effectively model the point-to-point flows in the national air transportation network, thereby supplying insight into the types of markets and the travelers that a particular facility should be prepared to serve.

Realizing the need to reduce the reporting requirements of air carriers to the minimum necessary in a deregulated environment, airport operators at a minimum would require the retention of the full 10% sampling for the O&D survey, but need only to have published output tables 8, 10 and 12, respectively titled: Domestic City-Pair Summary; City Pairs Arranged Alphabetically; Domestic City-Pair Summary by On-Line Origin and Destination; and Domestic Traffic Between Cities of Routing.

(b) The airport activity statistics, reported to CAB and summarized with the FAA Statistical Handbook of Aviation, are of major interest to aviation planners, for they represent passenger, cargo and aircraft activity at individual air traffic hubs. Statistics of this nature form an integral part of the data which the airport planner would consult in forecasting traffic trends and airport facility requirements to satisfy future needs of the air transportation system.

(c) Finally, continued mandatory collection and detailed standardized presentation of basic objective and functional expense and revenue groupings, for all major air carriers is necessary to provide airport operators with the finanical context in which to establish economic relationships with air carriers. The availability of such comparable airline financial data also ensures that airport operators will be able to determine the capabilities of carriers to meet their community's service needs.

The airport operator believes that all air carriers performing the function of carrying passengers must collect the same O&D data and airport activity statistics. Present reporting rules under the CAB's power classify carriers based on aircraft utilized, cost structure, and revenue generated for the purpose of reporting varying degrees of the above mentioned data. Airport operators believe strongly that all air carriers (including commuters, regionals, or "low fare" carriers) have the same reporting requirements as the traditional major carriers. The collection of this data will enable its users to have a full and concise picture of the air transportation system from the differing perspectives deregulation has created and will continue to create.

In conclusion, we firmly believe that certain statistical computations, essential to the development of a safe and efficient air transportation system, can be made available only through mandatory reporting requirements and public dissemination program. Such programs do not contradict the spirit of deregulation. Rather, they fulfill the limited role of government through the creation of a consumer-oriented environment in which market forces operate freely for the benefit of all.

[Attachment C]

ASSURING THE PUBLIC AVAILABILITY OF COMPREHENSIVE MARKET TRAFFIC DATA

SEC. . Section 407 is amended by adding at the end thereof the following new subsection:

LIMITATION ON AUTHORITY

"(d) The Secretary shall by rule, after notice and comment by all interested parties (including the air carrier industry and users of air carrier records and reports), reduce reporting requirements under this section as necessary to balance the burden on air carriers and foreign air carriers with the public interest in assuring the availability of necessary data that would enhance competitiveness among fully-informed airlines. With respect to interstate and overseas air transportation, the provisions of this section shall apply only to the extent necessary to administer those functions transferred with respect to interstate and overseas air transportation to the Secretary by section 1601(b) of this Act and the Airport and Airway Improvement Act of 1982. Nothing in this subsection shall, however, either authorize the Secretary to discontinue the periodic collection of comprehensive market traffic data including, as a minimum, passenger traffic origination and destination survey data and air service segment data, or prohibit the Secretary from requiring all air carriers providing similar services to provide the same data. Such data shall promptly be made available on a cost-reimbursable basis to interested persons so as to enhance competition within the domestic airline industry."

[Attachment D]

COMMUNITY PROCEDURAL PROTECTION AGAINST ILLEGALLY HIGH AIRLINE FARES

DISCRIMINATION IN AIR FARES

"SEC. . (a) Section 404(b) of the Federal Aviation Act of 1958 (49 U.S.C. 1374) is amended by redesignating existing subsection (b) as (b)(1) and by adding at the end thereof the sentence "Enforcement of this subsection with respect to interstate and overseas air transportation shall be conducted under paragraphs (2) and (3) of this subsection to the extent these provisions are inconsistent with Titles IX and X of this Act.".

"(b) Section 404(b) of such Act is further amended by adding new paragraphs (2) and (3) at the end of subsection (b) as follows:

"(2) No court or Government agency of the United States shall have the authority under this subsection to set any rate, fare, or charge for air transportation. Except as provided in paragraph (3), there shall be no private right of action under this subsection.

"(3) Upon petition of any community directly affected, of the public owner or operator of its air carrier airport, or of the State in which such community or airport is located, the Secretary of Transportation shall administratively determine whether a rate, fare or charge of an air carrier is in violation of this subsection. If the Secretary determines that no such violation has occurred, he shall issue an order to that effect setting forth his reasons therefor. Any such order shall constitute agency action within the meaning of 5 U.S.C. 702. If the Secretary finds that a violation has occurred, he shall apply to a United States Attorney to institute in the proper court and to prosecute under the direction of the Attorney General all necessary proceedings for the enforcement of this subsection, including injunctive action, and for the punishment of any violations found by the Secretary to have occurred. The petitioner shall be given notice of such application. If within 30 days of the date of filing of such petition the Secretary shall have failed to commence an investigation of the matters alleged in the petition, or if within 90 days from the commencement of such investigation the Secretary shall not have made his administrative determination, or if within 90 days of the application of the Secretary the United States shall have failed to commence an action upon such application, the petitioner may bring a private action in any United States District Court for enforcement of this subsection as to matters covered by its petition.

[Attachment E]

EXCERPTS FROM AOCI 1984 LEGISLATIVE POSITIONS—FEBRUARY 1984

AIRLINE SERVICE FROM DOMESTIC AND INTERNATIONAL CARRIERS

A. *Domestic Air Service, Airline Fares, and Proprietors Rights*—

1. Urge Congress Not To Enact Any Provisions (in "CAB Sunset" Legislation or Otherwise) That Would Preempt or Restrict Airport Proprietors' Retained Rights (Sections 105 and 307, Federal Aviation Act) Over Airport Capacity, On-Airport Capacity Allocations or as to Determinations of Carrier Financial Fitness for Airport Tenancy Status

2. Support the Cessation by Legislation of the Civil Aeronautics Board Not Later Than January 1985, With the Transfer of Essential Remaining Functions to DOT on a Gradual Basis, and With "CAB Sunset" Legislation Given Adequate Protection to Community Interests:

a. Require DOT by Statute to Continue to Require Carriers to Make Available Essential Traffic Data Which Can be Used by Communities to Encourage Better Air Service From Incumbent or New Airlines

b. Improve the Essential Air Service Subsidy Program for Air Service to Smallest Communities. Congress Should Modify That Program (Section 419, Federal Aviation Act) (a) to Assure That DOT Will Guarantee More Adequate Service to Smallest Communities Served by Air Carrier or Commuter Airlines; and (b) to Insulate That Process From Partisan Political Influence

c. Urge Congress To Protect Communities by Statute Against Discriminatorily High and Preditorily Low Air Fares to Communities. Without Re-Regulating Domestic Airline Fares, Congress Should as a Minimum Enact a Mechanism by Which DOT Would be Required to Investigate Any Community's Claim of Discriminatory Fares and to Determine Whether the Challenged Fares Were Cost-Related, With Resort to the Federal Court System if Needed. Reports of Such Findings of Discrimination Should be Publicized and Copies Sent to the Appropriate Committees of the Congress

d. Support the Explicit Transfer to Other Federal Agencies of Expiring CAB Authority (Sections 404 and 411, Federal Aviation Act) To Guarantee After 1984 Adequate Consumer Protection Regulations (e.g., Overbooking, Denied Boarding Compensation, Lost Baggage Liability, Protection of Charter Passengers)

B. *U.S. International Air Service*—

As to the Mechanics of Making Awards of International Routes to U.S. Flag Carriers After Transfer to DOT of This Function From the CAB, Congress Should Provide as Follows in the "CAB Sunset" Legislation—

(1) Creation of an independent regulatory body within DOT to conduct quasi-judicial carrier selection process;

(2) Continued availability of a full-evidentiary hearing process for carrier selection, with cross-examination of witnesses allowed;

(3) Service and fare offerings proposed by selected carrier(s) should be made binding with a back-up carrier also selected; and

(4) Political insulation within Executive Branch for carrier selection process.

TESTIMONY OF THE AMERICAN ASSOCIATION OF AIRPORT EXECUTIVES ON SUNSET OF THE CIVIL AERONAUTICS BOARD

Mr. Chairman and Members of the Committee: I am Charles Barclay, Executive Vice President of the American Association of Airport Executives. AAAE is a professional membership association which represents over 900 men and women who administer approximately 600 airports nationwide. We accredit airport executives (Attachment A) to provide the individual with enhanced professional credentials. AAAE represents individuals from the largest to the smallest airports in the United States.

On behalf of our membership we appreciate the opportunity to present our views to the Committee on CAB sunset. AAAE believes that an orderly and thorough approach to CAB sunset, as suggested by Chairman Mineta, is a process which will serve the best interests of air transportation companies, consumers, and communities. Further, an orderly procedure for the sunset of CAB would serve to enhance the arguments of those who favor deregulation and would like to make this event a role-model for other government agencies or sections. Failure to adequately protect the interests of consumers and communities, protection incidentally that is consistent with the Airline Deregulation Act (ADA), will certainly serve the arguments against airline deregulation, CAB sunset, and the validity of their merits in the deregulation debate in other industries.

AAAE's members are primarily interested in seeing that the goals we present in our testimony are achieved rather than in the method of achievement. If time should prove that interpretation of current laws do indeed protect the interests of consumers and communities, then we will be pleased to congratulate the creative legal minds who explained that position. However, we believe that at this point, providing certainty to consumers and communities requires that the Congress act legislatively to clear up the ambiguities and omissions of current law.

AAAE encourages the Congress to address four areas of concern: (1) Consumer Protection Regulations; (2) Origin-Destination Data Collection; (3) Discriminatory Fare Protection; and (4) Essential Air Service Modifications.

I. CONSUMER PROTECTION REGULATIONS

AAAE believes that key consumer protection rules, such as denied boarding compensation and baggage liability, are too important to be left in questionable status. There should be no lapse in the effect of such regulations and one agency should be clearly responsible for enforcement of the rules.

Airport managers are the focal point of a local community's aviation concerns and complaints. We do not believe an experiment in eliminating these rules is necessary before we express the view that consumers and our local citizens will be very upset with all of us in government if these basic, accepted protections are withdrawn.

Such protections are consistent with a deregulated marketplace. Current law could be interpreted, in fact, to put the airline industry in a unique "safe-haven", free from any government (local or Federal) authority over unfair or deceptive practices, when such authority does exist over all other economically unregulated industries. We are aware of the DOT interpretation that the FTC prohibition is vitiated, but such reliance upon legislative intent is subject to potential legal challenges which could create an extended period of uncertainty.

Airline passengers and our fellow citizens in local communities deserve the same clear government authority to protect them from unfair and deceptive practices that consumers in other industries enjoy. We urge the Congress to clarify this authority, rest its responsibility with one government agency, and transfer the current body of CAB consumer regulations established under Section 404(a) and 411 to that agency.

II. ORIGIN—DESTINATION DATA COLLECTION

Airline deregulation has brought to communities the need to market themselves to airlines. We have been told about the advantages of making our market case directly to the airlines without the legal hurdles of CAB routes cases. However, the elimination, with the Board, of origin, destination and service segment data would so severely handicap communities' abilities to market, we feel somewhat dizzy in trying to follow the circular logic that explains our new advantages. We can market directly to airlines but would no longer have the information with which to conduct the market analysis.

The Board's current practice of time-delayed release of airline segment data should be continued to preserve the carriers' competitive needs for confidentiality. But we do not agree with the argument of some air carriers that the doctrine of deregulation requires the government to eliminate these basic reporting requirements. The fact that airline resources are today being allocated by market forces is not synonymous with the notion that public interests in the air transportation system have been eliminated. The Declaration of Policy of the Airline Deregulation Act makes clear that the legislation does not intend to create a laissez faire attitude on the part of government.

We believe that it is in the best interest of the national transportation system to have accurate data available on air travel patterns, and indeed it would serve to foster competition by providing communities with the tools to properly analyze transportation needs and to seek out new competitors where required. We urge the Committee to include the requirement that DOT continue to collect and publish the passenger traffic data currently being produced by the CAB.

III. DISCRIMINATORY AIR FARES

Airport executives are concerned that air transportation has been placed in the unique position that even the severest, most obvious example of price discrimination has no remedy whatsoever. We wish to make clear that we are not advocating the reregulation of air fares, or even suggesting that anyone other than an airline should be able to establish a fare level (except as the act currently provides for Essential Air Service cases). Our point is that out-and-out, unjust discrimination and undue preference appear to be legal in air transportation even though they are outlawed (at least potentially) for other products and services in the unregulated marketplace.

Products are subject to Federal antitrust laws which bar non-cost related price discrimination. Services are, at least potentially, subject to State regulation to protect consumers or communities from unjust discrimination. However, air transportation appears to be uniquely immune from any control over even blatant discriminatory pricing by the fact that it is a service which the ADA has preempted from any State regulation.

We are not proposing that the Congress consider anything inconsistent with the letter or spirit of the ADA. Section 102(a)(3) of the Act, the Declaration of Policy, states that among other things the following is in the public interest:

"(3) The availability of a variety of adequate, economic, efficient, and low-price services by air carriers *without unjust discriminations, undue preferences or advantages or unfair or deceptive practices* * * *." (Emphasis added.)

AAAE believes that language similar to section 404(b) should be reinstated in the law with the clear intent that the purpose is not to reregulate air fares or allow any court or government agency to establish fares. A court or agency should, however, be empowered to require an airline to cease charging a proven discriminatory, preferential, or prejudicial fare. We are not presenting the specific language or complaint mechanism that should be used to address this problem, but we would be glad to work with the Committee on the details of a remedy.

IV. ESSENTIAL AIR SERVICE

AAAE has provided the Committee with its testimony on the EAS program and will not repeat our full statement here. In capsule we hope the Committee will consider the following five points in drafting sunset legislation:

(1) The EAS program should encourage greater administrative flexibility to customize the program for each community.

(2) Community views should be given added emphasis in the statute for both EAS standards and carrier selection.

(3) The EAS program should receive "political insulation" within DOT similar to that being discussed for international aviation.

(4) Some of the 50% funding reduction that federal air service subsidy has absorbed since 1979 should be reinstated.

(5) Congress should begin to consider the form of an EAS program in the post-1988 period.

We do want to re-emphasize our point that there is a misconception among some individuals that the original intent of the 1988 EAS date was as a sunset of the entire subsidy program. On the contrary, the stated intent in 1978 was to provide a guaranteed period against exit to accommodate the concerns of small communities about the deregulatory transition. Section 102(a)(8), the Declaration of Policy which continues in force indefinitely, makes clear our point that the intent was not to sunset such a program in its entirety. It states as being in the public interest:

"(8) The maintenance of a comprehensive and convenient system of continuous scheduled airline service for small communities and for isolated areas, with direct Federal assistance where appropriate."

The language and intent on this issue could not be clearer, and while we realize that the Committee may not wish to address the continuation of the EAS program in the immediate legislation it is considering, we do encourage you to begin the study of the post-1988 changes that may be necessary. We believe the Congress should commit itself to its 1978 intent and the Act's declaration of policy, so that small and isolated communities can be assured that their continued air service is contingent upon its merits as part of the system, rather than on an arbitrary date.

Thank you for the opportunity to present these views. I would be pleased to answer any questions of the Committee Members.

American Association of Airport Executives
2029 K STREET, N.W. ■ WASHINGTON, D.C. 20036 ■ (202) 331-859

Professional Membership Requirements

(ADOPTED 1954; REVISED 1980)

- **Qualifications of Applicants**
- **The Examination**
- **Places and Times of Examination**

The American Association of Airport Executives is an organization devoted to the interest of the individual in airport management. Since its inception in 1928, the Association planned to become a professional organization. To that end, a Code of Ethics was adopted in 1953. The following year the then Executive members of the organization became the nucleus of the present organization. Subsequent admission to the Association in the Professional category has been by examination only. This requirement is based on the realization that the knowledge and ability to handle the many responsibilities connected with airport management can be tested only by examination.

Membership in the American Association of Airport Executives is voluntary. The Association is neither a policing nor educational institution. It has no intention of derogating the qualifications of airport personnel who, for whatever the reasons may be, do not desire to submit to the examination.

The professional membership requirements consist of an original paper on some phase of airport management, and a comprehensive examination on a level comparable to examinations in other professional fields. Upon the successful completion of these requirements, the Accredited Airport Executive certificate is awarded and the candidate admitted to membership as an Executive member. Such members are eligible to use the initials A.A.E. after their names, or the words "Accredited Airport Executive."

The Association suggests reference material for those who wish to prepare themselves for the examination. This listing does not imply that there is not other material available. The applicant may prepare for the examination using any references he deems appropriate.

Executive Candidate Membership

The process by which an airport administrator proceeds to the professional Accredited Airport Executive status is by first becoming an Affiliate member. Affiliate membership is open to any individual who has active responsibility for the management or administration of a public airport. As an Affiliate, with at least one year experience in airport management, the member may then declare the intention of becoming an Accredited Airport Executive at which time he/she would be reclassified as an Executive Candidate member. Executive Candidates are expected to successfully complete the professional membership requirements within three years; otherwise they will become ineligible to continue to work toward professional status.

Professional Status

In order to qualify for Executive membership in the Association, an applicant must:

- Be at least 21 years of age and of good moral character.
- Possess a four year degree from an accredited college. Executive Candidates lacking the college degree may substitute civil airport management experience on a two to one basis with a total of eight years experience being the equivalent of a four year college degree.
- Submit an application for registration containing information with respect to training, education, and experience. Such information filed by an applicant shall be warranted by the applicant as being true and complete. Any material omission or misstatement shall be grounds for rejection of the application. The application shall be supported by such information as the Board of Examiners may prescribe.
- Submit at time of registration the $100 examination fee.
- Submit an original thesis or paper on an approved subject.
- Establish qualifications for professional accreditation in the field of airport management by successfully completing the Association's written and oral examination.
- Acquire at least three years' experience in airport administration at a public use airport before the A.A.E. designation is awarded. The other requirements may, however, be completed before the experience requirement is fulfilled.

The Thesis

The thesis is an intensive study of some particular activity or problem in which the applicant has been directly involved in his/her airport management career, or it may be the result of research into a current airport management topic. It must be an original paper, normally of 3,000 to 5,000 words. The subject must first be suggested by the candidate and receive the approval of the Board of Examiners before the paper may be written. It must be submitted within the established time limit and accepted by the Board of Examiners before the candidate is eligible to take the examination. The thesis is submitted directly to this Board and, after acceptance, it is placed in the Association's library for use by other members.

The Examination

The written examination is a comprehensive one; it is divided into three parts: Government and Public Relations, Management Principles and Practices, and General Transportation History and Economics. Applicants are allowed six hours to complete the written examination. A fourth part, consisting of an oral interview will be administered after approval of the thesis and successful completion of each of the three portions of the written examination. Partial retakes of the examination will be required if one or more parts of the examination are not successfully completed. The $100 registration fee includes the regular examination fee; however, an additional fee of $50 is required to retake any or all parts of the examination.

Written Examination Format

The examination is comprised of a combination of specific general questions. The multiple-choice and true-false questions have either a right answer or a combination of correct answers. The essay questions require the selection and defense of the answer. Even when a question encompasses a broad range of subject matter, the applicant is required to be as specific as possible and restrict answer to the issues raised in the question.

The purpose of the examination is to assess depth of knowledge in broad areas of subject matter which are required for any responsible position in airport management. Candidates are urged to be thoroughly familiar with their subject material before taking the exam. Experience has shown that taking the exam without preparation, to "test the water," results only in failure and disappointment. Further, it does not gain the applicant any additional insight into the retake examination, since the questions can be completely different and cover different aspects of the respective subject.

Candidates are encouraged to become familiar with all aspects of airport operations at both large and small airports. Because of the nature of the membership, questions will cover subject material from the smallest general aviation airport to a major air carrier airport.

Evaluation of the essay portion of the examination is done by the Association's Board of Examiners. The multiple-choice and true-false questions are graded to an answer key. Tests are identified by number rather than by name in order to insure objectivity. In addition to the substance of the candidate's answers to the essay questions, consideration is given to the candidate's demonstration of the proper application of the rules of English and the ability to organize and present ideas in a logical manner.

Sample Questions

1. Essay
   Develop a budget for one fiscal year for a small hub airport. Include all items and explanations necessary, as well as initial assumptions, i.e., airport location, government set-up, etc.
2. Multiple Choice
   The Federal Aviation Act of 1958 as amended requires an air carrier airport sponsor to
   a) Operate a control tower
   b) Employ a full time manager
   c) Obtain an Airport Operating Certificate
   d) Install runway approach aids
3. True/False
   The formal organization leader is also the informal leader in most instances.

Oral Interview

The oral interview normally takes place in an AAAE region in conjunction with other aviation or association activities in order to encourage attendance at these functions and allow the opportunity for multiple interviews at one session. The Board of Examiners member from that region will chair the interview panel, supported by not less than two nor more than four accredited AAAE members. The interview is a well-structured, yet informal, session designed to allow the applicant to demonstrate a knowledge of:

1) Airport business management
2) Planning and construction
3) Operations
4) Maintenance
5) Community relations

It will last from two to four hours. The panel may use visual aids and request the applicant to discuss or explain the significant features shown.

The purpose of the interview is to demonstrate the candidate's knowledge in the area of airport management as well as the ability to speak clearly and effectively. The interview will be conducted much the same as an interview for an upper-level management position. The candidate can only be failed on lack of knowledge, not on style or mannerism. The candidate will be notified of the results immediately after the interview has been concluded.

Study Materials

In order to help prepare an applicant for the written examination, a bibliography of study materials has been prepared which AAAE feels is important and relevant to airport management. The references listed cover all of the subjects which appear in the examination. A thorough knowledge of the suggested references, familiarization with the general references, and individual experience in airport management will provide the preparation necessary for successful completion of the examination.

Suggested References

As the references are periodically revised and updated to keep pace with the dynamic growth of aviation, they are listed separately; this list entitled Study Guide is included with the Professional Membership Requirements or may be requested from the AAAE Office. The list is dated; candidates are cautioned to ascertain when preparing for the examination that the Study Guide is a current one. Inclusion of a reference in the Study Guide does not indicate endorsement by the Association of the authors or their views. The listing includes specific textbooks, aeronautical statutes, selected papers, and publications. Examination questions are based on the key or major points included in these references.

Written Examination Subject Matter

Part I—Government and Public Relations

The knowledge and ability to deal effectively with both governmental agencies and the general public is an essential part of modern airport management. The day is long past when the airport executive can operate in a near vacuum; today's airport manager must be able to represent the airport's interest in a variety of ways to a variety of people. The applicant should possess the knowledge in this area as contained in the public administration and public relations textbooks and applicable statutes and regulations.*

Part II—Management Principles and Practices

Airport executives, in their daily work, deal with problems which require familiarity with the fundamentals of business management. Therefore, a part of the examination is devoted to questions pertaining to the elements of business organization and finance. Applicants can prepare themselves for this test by studying standard textbooks on the subject.*

Part III—General Transportation History and Economics

Familiarity with the general services performed by various types of transportation instrumentalities is required of every person engaged in airport management.

Accordingly, one section in the test is devoted to questions pertaining to the organization, service, operation, and regulation of transportation enterprises. It is recommended that the applicant be prepared to answer questions based upon subject matter found in recognized textbooks on the subject.*

Part IV—Airport Management

The principles, problems, and practices of airport management constitute the basic knowledge required for successful airport administration. This section of the examination is conducted before an oral interview panel. Applicants can prepare themselves for this section through on-the-job experience and a study or review of publications and general reference material pertinent to subject.*

General References

Candidates will also find helpful the review of aviation publications such as: Airport Services Management, Airline Executive, Commuter Air, Business Aviation, Airport Report and the AAAE Conference Proceedings. In addition, candidates should refer to the AAAE Reference Library listing found in the Executive Manuals for study materials in areas where the individual feels further preparation may be warranted. This is particularly true if the applicant's background has been specialized in one area, such as engineering or maintenance. Strengthening management and administrative knowledge with review of specialized papers on contracts, budgeting, management controls, etc. would be in order.

Candidates will also find useful a review of nonaviation publications such as Harvard Business Review, Public Administration and The Wall Street Journal.

Availability of Study Materials

Most of the recommended study materials are available in public college libraries. Specific Federal Government documents or statutes are normally available in airports' general office or obtained directly from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

AAAE has the references listed in the Study Guide available in packet form. Once the applicant has submitted the thesis, the Association will supply the applicant with the complete Study Guide at no additional charge.

Places and Times of Examination

The written examinations are normally given twice yearly at the Association's annual conference, the location which varies from year to year, and at the National Airports Conference held annually, University of Oklahoma in Norman. Definite information on location and dates will be announced in the Association's newsletter. Under special arrangement approved by the Chairman of the Board of Examiners, the test may be administered in or near the candidate's home town under the supervision of a recognized educator. Prior request to take the examination must in all cases be made. A maximum of one day (a morning and afternoon session each of three hours duration) is permitted for the written examination.

The oral interview, structured to test a candidate's knowledge of Airport Management, will be conducted at irregular intervals throughout the year in the various AAAE regions as scheduled by the Chairman of the Board of Examiners.

Fees

Apart from the regular annual dues paid by the Executive Candidate Member, a $100 registration fee is required. No further fee is required for the study guide, examination or oral interview. However, an additional $50 fee is required in the event a candidate must retake a portion or all of the examination. In no case will the fee be refundable due failure to successfully complete the examination.

Administration

The Board of Examiners consists of the Chairman, six Examiners (an Accredited Airport Executive from each of the six regions), and the Registrar, all appointed by the

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*Refer to current Study Guide for specific references.

Board of Directors. This Board is responsible for the administration of the professional program.

Requests for information, filing of applications for approval of thesis subject and for permission to take the examination, submission of the required fees and similar matters connected with the program should be initially directed to the Registrar at the Association's Washington office.

Time Limits

There is no obligation for the member to get into the accreditation program; the decision is one the member must make. However, once the decision is made the member must regard it as a commitment to complete the program within the time limits established by the Association. The requirements must be fulfilled in sequence—that is, registration, the thesis, the written exam, and finally the oral interview and each must be completed within the prescribed time limits.

Waivers and Exemptions

The accreditation program is neither a training nor educational program; it is a testing of knowledge already acquired. Only those active in civil airport management are eligible to enter the program. No exemptions from any of the requirements are made, regardless of the candidate's experience or education. However, recognition is given for airport management experience and professional activities such as participation in conferences and committees, authorship of professional articles; service as an officer, director or chairman. This recognition is given by means of credits which assist the applicant in obtaining a satisfactory examination grade.*

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*Refer to insert for current information on the point system.

Mr. MINETA. Please proceed.

TESTIMONY OF J. DONALD REILLY, EXECUTIVE DIRECTOR AND SECRETARY GENERAL, AIRPORT OPERATORS COUNCIL INTERNATIONAL; AND CHARLES BARCLAY, EXECUTIVE VICE PRESIDENT, AMERICAN ASSOCIATION OF AIRPORT EXECUTIVES

Mr. REILLY. Thank you very much, Mr. Chairman, and members of the committee. I appreciate your putting my statement in the record, and I would like to just very briefly summarize our basic comments at this time.

AOCI supports sunset legislation, at least to the extent necessary to insure that, one, several critical gaps are not left unresolved in the Airline Deregulation Act of 1978, and, two, that airports historical proprietary powers and rights are not impinged upon in the legislative process.

To summarize, first we feel that DOT must be required by legislation to continue to collect important and necessary basic airline traffic data, so that airports, airlines, manufacturers, the Government and others can operate from a base of adequate industry information. Without such required data, the various segments of the industry and Government would be limited to guesswork in the planning of new airport and airline facilities and services and types of new aircraft needed.

We feel legislation is necessary to insure the continued collection of: One, origin, destination, and service segment statistics; two, airport activity statistics; and three, standardized presentation of basic functional expense and revenue groupings for all of their carriers.

Second, smaller airports, particularly one-airline monopoly markets, need the transfer to DOT of section 404(b) of the Federal Aviation Act, so that they can question whether an extremely high fare should be investigated to determine whether that fare is unjustly discriminatory and a clear gouging of passengers in a captive market. Therefore, AOCI proposes simply that a community be able to require DOT to determine whether an extremely high fare is unjustly discriminatory and without any basis in cost.

The AOCI draft amendment attached to our statement sets out an equitable procedure for this process.

Third, we feel that section 419, essential air service program, needs a midcourse statutory infusion of flexibility. Unless the statute is amended now to give DOT greater program flexibility than CAB had to respond to community needs, we feel that: One, today's rigid EAS program will become increasingly irrelevant to the air service needs of smaller communities; two, Congress will not have developed any basis for determining whether any parts of the EAS program should be modified and continued after 1988; and three, virtually all communities assisted by the EAS program could lose all scheduled service when subsidy ends.

Mr. Chairman, we will provide proposed amendment language for the committee shortly.

Fourth, we feel that section 105(b), insuring the proprietary powers and riqhts of airports which has worked so very well must be continued without change in any CAB sunset bill.

Mr. Chairman, we appreciate this opportunity to convey our views on this subject, and we would be happy to answer any questions you may have.

Mr. **Mineta**. Mr. Barclay.

Mr. **Barclay**. Mr. Chairman, I would like to just summarize our statement.

On behalf of our members, we appreciate the opportunity to testify on CAB sunset. AAAE believes that an orderly and thorough approach to CAB sunset, as suggested by Chairman Mineta, is a process which will serve the best interests of air transportation companies, consumers and communities.

We believe at this point that providing certainty to consumers and communities requires that the Congress act legislatively to clear up the ambiguities and omissions of current law.

AAAE encourages Congress to address four areas: Consumer protection regulations; origin and destination data collection; discriminatory fare protection; and essential air service modifications.

AAAE believes that key consumer protection rules such as denied boarding compensation and baggage liability are too important to be left in questionable status. There should be no lapse in the effect of such regulations, and one agency should be clearly responsible for enforcement of these rules.

Much has been said on this this morning, so I would just like to add that we urge the Congress to clarify this authority and rest its responsibility with one Government agency and transfer the current body of CAB consumer regulations established under sections 404(a) and 411 to that agency.

Referring to origin and destination data collection, airline deregulation has brought to communities the need to market themselves to airlines. We have been told on numerous occasions about the advantages of making our market case directly to airlines without the legal hurdles of CAB route cases, but the elimination with the Board of origin, destination and service segment data would so severely handicap communities' abilities to market, we feel somewhat dizzy in trying to follow the circular logic that explains our new advantages. We can market directly to the airlines, but we no longer have the information with which to conduct a market survey.

The Board's current practice of time-delayed release of airline segment data should be continued to preserve the carriers' competitive needs for confidentiality.

We do not agree with the argument of some of the carriers that the doctrine of deregulation requires the elimination of this basic reporting requirement.

We believe it is in the best interest of the national transportation system to have data available on patterns. And it would foster competition by providing communities with the tools to properly analyze transportation needs and to seek out new competitors where required.

We urge the committee to include the requirement that DOT continue to collect and publish passenger traffic data currently being produced by the CAB.

Turning to discriminatory airfares. Airport executives are concerned that air transportation has been placed in a unique position. The even the severest most obvious example of price discrimination has no remedy whatsoever. We wish to make clear that we are not advocating the reregulation of airfares, or even suggesting that anyone other than an air carrier be allowed to set a fare.

Our point is that out and out unjust discrimination and undue preference appear to be legal in air transportation when those abuses are outlawed for other products and services in the unregulated marketplace.

Products are subject to Federal antitrust laws, which bar noncost related price discrimination. Services are at least potentially subject to state regulation to protect consumers or communities from unjust discrimination.

However, air transportation appears to be uniquely immune from any control over even blatant price discrimination by the fact that it is a service which the ADA has preempted from any state regulation.

We are not proposing that the Congress consider anything inconsistent with the letter or spirit of the ADA. Section 102(a)(3) of the act, the declaration of policy states that among other things in the public interest is the availability of variety of adequate economic efficient and low priced services by air carriers without unjust discriminations, undue preferences or advantages, or unfair or deceptive practices.

AAAE believes the language similar to section 404(b) should be reinstated in the law with the clear intent that the purpose is not to reregulate airfares, or to allow any court or agency to establish fares. A court or agency should, however, be empowered to require an airline to cease charging and provide damages for a proven discriminatory preferential or prejudicial fare.

Finally, on essential air service, AAAE has provided the committee with its testimony on the EAS program, and we will not repeat it here. However, we do want to take this opportunity to reemphasize our point that there has been a widely publicized misconception among some individuals that the original intent of the 1988 EAS date was to subsidize the entire program.

But the stated intent in 1978 was to provide a guaranteed period against exit. To vitiate the concerns of small communities about the deregulatory transition. Section 102(a)(8) declaration of policy, which continues in force indefinitely, makes clear our point that the intent was not to sunset such a program in its entirety.

It states as being in the public interest, maintenance of a comprehensive and convenient system of continuous scheduled airline service for small communities is isolated areas with direct Federal assistance where appropriate. The language and intent on this issue could not be clearer. And while we realize that the committee may not wish to address the long-term continuation of the EAS program in the immediate legislation it is considering, we do encourage you to begin the study of the post-1988 changes that may be necessary.

We believe that Congress should commit itself to its 1978 intent in the act's declaration of policy so that small and isolated communities can be assured that their continued air service is contingent upon its merits as part of the system, rather than on an arbitrary date.

Thank you, Mr. Chairman. And I would be happy to answer any questions you may have.

Mr. **Mineta**. Thank you, Mr. Reilly and Mr. Barclay. In the testimony of both organizations you indicate support for political insulation of decision making by DOT. Could you elaborate on the procedural and organizational measures which you think would produce the needed insulation?

Mr. **Reilly**. Mr. Chairman, on the attachment E to our testimony, at the bottom of the page, we have U.S. international air services. We have very briefly described what we feel would be appropriate regarding international air services. And if you would like, Mr. Chairman, we may flush that out and present to you a more detailed comment.

Basically, the creation of independent regulatory body, full evidentiary hearing process, service and fares offering, proposed by selected carriers should be made binding and without backup—with a backup carrier selection and political insulation within the executive branch for carrier selection process.

As to the last part of that, which perhaps your question more directly goes to, the insulation process. Right now, I do not have a total answer to that. We would be glad to provide for you further detail.

Mr. **Mineta**. That would be fine.

Mr. **Barclay**. If I could add. I think there are a number of recipes that have been already suggested for insulation within DOT. And I think, rather than specific mechanisms, what makes us uncomfortable is the fact that the EAS program would be analogous to a totally discretionary IDAP, IAP program. Really without any system of allocation other than judgment of the people within DOT. The current DOT under the microscope, that will be on it in the coming years might be very good in fending off political pressure.

We worry that the long term good Government notions of whether or not there should be some insulation would support a program to provide that.

Mr. **Mineta**. Now again in the testimony of both organizations, you urge that some steps be taken against discriminatory fares. Now before deregulation a discriminatory fare usually referred to a discount fare which did not cover its fair share of cost.

Would you envision that the statutory prohibitions against discrimination that you recommend would be used to block discount fares which are too low?

Mr. **Reilly**. On behalf of AOCI, absolutely not, Mr. Chairman. We are after the situation where you have a monopoly served market, or a market with one or two carriers where those carriers undertake a very obvious process. Very high fare levels, much higher than can be justified in any reasonable manner, recognizing that those high fares are being used to offset and subsidize high competitive routes. And that is the extent of our desire to put some reign on the situation.

Mr. **Barclay**. We are not intending to get at the just and reasonable notions that are in 404(a) or were regulated previously. We are really saying that we want to be the same as other unregulated industries. That where there is a case of severe proven and obvious discrimination, that there is some remedy somewhere, for that, other than waiting for a new entrant.

If you are in Wolf Point one day and there is 10 feet of snow on the ground, and the carrier decides that because there is no other way to get out, the $100 fare is now $10,000, there should be some remedy other than waiting for a new entrant to come through the snowstorm for you.

And that is the only thing that we're trying to get at.

Mr. MINETA. The AOCI position paper, attachment E that you mentioned, indicates that AOCI believes that on international routes, service, and fare proposals, the proposals of the authorized carriers should be binding. Has there been a problem with international carriers not living up to the proposals they made before they were selected?

Mr. REILLY. Mr. Chairman, I wish I'd known this was going to come up. I know there are situations where various air carriers in the past have competed to secure air service rights. And during that process many great promises and inferences are made. This I know has been a problem and has come up in the past.

And again, Mr. Chairman, I would be happy to provide some basic backup on that.

Mr. MINETA. With respect to collection of data. It has been our understanding that DOT plans to continue collecting O&D data after CAB sunset.

Do you have the same understanding of DOT's plans?

Mr. REILLY. Mr. Chairman, for our half, let me say that any understanding of what DOT would like to do does not address and cure this problem. In order for even the DOT, I feel, to be able to extract from all the carriers, trunks, nationals, commuters, whatever they might be, all of the various informations that they do want, they are going to need some legislative justification.

There is no way that this can be done privately, because that leaves it up to the option of whether an airline wants to or does not want to contribute the information. This is one of the problems I have with the ATA proposal that has been surfaced in the past about collecting the information on behalf of the airlines.

I feel that some legislative direction is going to be required so that all of this factual background material, statistics that have been collected for years around which we base all of our future decisions is continued, rather than leaving it up to a good wish or an inference on behalf of some DOT people. And with every change in administration, you're going to get different views as to what kind of information is or is not valuable and important.

I personally feel that this should be directed legislatively.

Mr. BARCLAY. We agree. There is a notion that the deregulation transition has completed itself. From the point of view of medium and small communities, the reallocation of resources is going on at a very heavy pace.

To the extent that communities need to market themselves, need to get the information, to go out and convince carriers to either come in or add service, the OMB data is essential.

Mr. MINETA. Do you have any reservations about DOT's position that the data collection provisions in the DOT Act give them the authority to collect all necessary aviation data?

Mr. **Reilly**. I think it is important that they have the legislative authority to collect that information.

Mr. **Barclay**. If I understand the chairman, you are saying that their existing authority without and eliminating the 407 would be sufficient?

We would be concerned as to why Congress eliminated or someone might make the legal argument that since Congress eliminated 407 they did not intend that collection to continue under the general powers of DOT or else they would have left 407 in the law.

I think that might be subject to a legal challenge by someone who did not want to provide the information.

Mr. **Reilly**. As attachment C to our statement, we have drafted legislative language that we think would cure that problem.

Mr. **Mineta**. The Department of Transportation earlier testified that while it would not have the authority to prevent discrimination against the handicapped by the carriers on board the aircraft the Department would try to exercise section 504 authority over the airports to get the airports to contractually force the carriers to be nondiscriminatory in the service that they provide.

Is that putting the airport operator in the position of being a mini-CAB? Would DOT have the authority in your view to force you to regulate carriers in an area where they—where the DOT itself would not have the authority?

Mr. **Barclay**. We are intrigued by the chairman's notion that we might be able to regulate airline food under this and we would like to give that a little thought before we address that part of it.

But I think the logical extension of that theory, Mr. Chairman, would be that you could eliminate all DOT regulation of airlines and put everything in the airport/airline contractual arrangement and police it by having airports get Federal funds.

We would not agree that that is the proper way to regulate handicapped services. We, in accepting Federal funds, do comply with the regulation to provide in the buildings handicapped access and we do not feel that we should be policing the air carriers on that issue.

Mr. **Reilly**. It even goes further. As you are well aware and the members are, all airports have outstanding and in many cases very long contractual obligations with the airlines. It is very difficult to just unilaterally and summarily try to get the airlines to open up their contracts to have new ingredients put in.

It is a case where the DOT wants something done. They are trying to get a third party to do it. The responsibility of the third party in this case, the airport, only extends in handicapped situations for example, to new airport terminal facilities.

I can see where it would be almost impossible for the airports to force this on the airlines and police it.

Right now you have the FAA and DOT that have airport inspectors that go around to look at a number of these types of situations and this seems like another natural situation for them to take on if they want to.

Mr. **Mineta**. Mr. Hammerschmidt.

Mr. **Hammerschmidt**. Thank you, Mr. Chairman. Thank you Mr. Barclay and Mr. Reilly for your testimony.

Do either AOCI or AAAE have an opinion about whether we should retain the CAB's existing authority to make financial fitness determinations under title IV and specifically transfer this authority to DOT?

Mr. Barclay.

Mr. **Barclay**. We do not have a specific position on that, Mr. Hammerschmidt, but I am sure our members would support the idea of a fitness, basic fitness finding of some kind at least within the FAA certificate.

Mr. **Reilly**. We do cover that issue in our testimony. I think it is on the top of page 8, where we say, for example, any shrinkage of the Federal financial fitness test under section 401-D of the act as to the financial responsibility of air carriers must not preclude an airport to be deprived of his right to be continuing to require under 105-B in a discriminatory manner that all airlines including all new tenants airlines meet local conditions for reasonable insurance bonding, escrowed landing fees and space rental.

We feel there should be some determination on the financial fitness of airlines. It is only fair and right if they are going to be in the system that they should be able to prove to the proprietors that they are able to meet all of their financial responsibilities.

Mr. **Hammerschmidt**. I think that further clarifies your testimony on your position, Mr. Reilly. We appreciate it.

DOT's reluctance to propose or endorse legislation to clarify the ADA stems, in part, from a concern that any clarifying legislation could become the magnet for diverse amendments by special interests that could confuse or interfere with an orderly sunset of the CAB.

Do both AOCI and AAAE endorse the concept of a clean bill with the intent of getting such legislation passed and enacted during this session of the Congress?

Mr. **Barclay**. We certainly do, Mr. Hammerschmidt.

Mr. **Reilly**. We do.

Mr. **Hammerschmidt**. Thank you, Mr. Chairman. Thank you, gentlemen.

Mr. **Mineta**. Mr. Levitas.

Mr. **Levitas**. Thank you.

Mr. Barclay, let me get back to the discriminatory fair situation. Services are not subject to the Robinson-Patman Act as I understand it. What about the other antitrust laws, the Sherman Act or the Clayton Act?

Mr. **Barclay**. I am not sure I follow.

Mr. **Levitas**. The Robinson-Patman Act, as I understand it, deals with discriminatory pricing. What about predatory pricing?

Mr. **Barclay**. I believe predacious notions are covering services and in fact air transportation is my understanding.

Our point was more that the Robinson-Patman Act says that you cannot have noncrossed price discrimination in products and it is my understanding of the legislative history of that act was that they discussed applying it to services and decided that they would leave services to the States to regulate for price discrimination.

And because of the ADA, it eliminates the rights of the States to get into airline fares, services, and routes. We feel like air transportation is in this no man's land that is unique even to the unregulated marketplace.

I cannot emphasize more that we are not talking about getting back into the old just and reasonable language, which is 404–A.

Mr. Levitas. I understand that. You are talking about discrimination which, as I recall some of the defenses to Robinson-Patman prosecution litigation, is meeting competition as a legitimate basis for reducing price with respect to goods, so therefore a carrier could justify—there are a whole variety of exemptions or defenses which would apply.

I think you make a good point there and it is something that perhaps we ought to take a very close look at.

Mr. Barclay. As I can add, we recognize Robinson-Patman is not a widely used concept. The fact that it is an arrow in the quiver of Government to respond in a really extreme case of discrimination may be deterring some examples of price discrimination.

It does provide a remedy of some pain.

Mr. Levitas. You are not suggesting this be made the subject of regulatory actions? Rather that it would be treated as goods are under Robinson-Patman at the present time?

Mr. Barclay. This came up in the early sunset proposals and the carriers objected at that time to the ability of communities or consumers to go directly to court. So the procedure being suggested by AOCI, which would probably be a good one, is that communities or consumers would complain to DOT. DOT would have a finding as to whether or not discrinination occurred in this case and then DOT would take the case to court, if that—if it were necessary to go that far. So, it really could not be used as a very—to have a lot of litigation on it.

I would say on this issue, I was struck by Monday's Aviation Daily, that said the airlines are becoming more vocal in their complaints against nations that discriminate against them because the industry believes the U.S. Government will back up their complaints.

The notion that we are against discrimination when it occurs against airlines in foreign countries but that it is sort of OK if it occurs in the United States against consumers and communities is not a theory that we support.

Mr. Reilly. If I could add a quick comment on that, I would not totally rule out the regulatory concept because I think we all want to try to keep any such quiver in the bow simple, direct, and expedient. And in this respect, once you try to get into the courts you have automatically abrogated all of the simplicity and speed that you might otherwise have.

That is why I think it is generally conceded among airport people that, as noted in attachment D to our statement, we would like to have considered seriously the concept of an airport which feels that the prices of the monopoly carrier are discriminatory, that there be some recourse directly to the Department of Transportation for at least an immediate quick look at it.

If the Department sees no problem they say no problem. If they, too, are convinced of the merits, that this is just really bad for the traveling public in that segment of the country that use that airport, then I think it is incumbent upon the Federal Government, the Department of Transportation, to address this to the airlines that might be violating rules of propriety and see if something can be brought back to reason.

If not, then perhaps it is time to go to the courts. But expediency is simplest. The simplest process possible should be the direct objective.

Mr. LEVITAS. And you would propose confining that standing to the airport operator and not to the consumer?

Mr. REILLY. We do restrict it to the public owner of the airport or the State in which the community or airport is located. It could very well be extended, but I would hope that the airport proprietor, who is generally the first to know about airfare changes—or sometimes last, I must say—but generally he keeps on top of this, abreast of it, and perhaps is more familiar with comparative fares in other market and such.

Mr. LEVITAS. And in the case—let me move away from that now. I think I get your point. Your recommendation, with respect to essential air service, is essentially proposing a political insulation, is the main thrust of your position there.

Mr. REILLY. That is one of the thrusts of AOCI's position. We do not care whether the city is Democratic or Republican and the administration is Democratic or Republican. If, in fact, that city deserves the essential air service on other reasonable grounds that it should be contained, therefore perhaps insulation to some extent is required.

Mr. LEVITAS. Have you any reason to believe that there have been political decisions made on essential air service, up to this point?

Mr. REILLY. None that I know of.

Mr. LEVITAS. The question of Federal preemption, which I think a pretty strong case has been made that there is a need to have Federal preemption. If there is any residual Federal regulation of consumer protection matters, and that was borne out not only by the industry but also by State regulators, according to the GAO testimony.

You argue that Federal preemption must not impinge on airport proprietary retained rights and powers. In the language that you make reference to, on page 7 of your testimony, isn't that adequate?

Mr. REILLY. We would like to see this language carried over into a new law, that is correct. That is the provision that we referred to before, that we mentioned has worked well, and that it should continue.

Mr. LEVITAS. Thank you. I have no further questions.

Mr. MINETA. Fine. Thank you very much, Mr. Reilly and Mr. Barclay, for your testimony here today.

Mr. REILLY. Thank you, Mr. Chairman.

Mr. MINETA. Next we call on Marvin S. Cohen, who chaired the Civil Aeronautics Board from 1978 to 1981.

Mr. Cohen, the full text of your prepared statement will appear in the record at this point.

[Statement referred to follows:]

TESTIMONY BEFORE THE PUBLIC WORKS AND TRANSPORTATION COMMITTEE

AVIATION SUBCOMMITTEE
U.S. HOUSE OF REPRESENTATIVES

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MARCH 13, 1984

Mr. Chairman and Members of the Subcommittee:

I appreciate your invitation to appear before this Subcommittee to comment upon the imminent sunset of the CAB and the transfer of its remaining functions to the Department of Transportation and other Federal agencies.

I apologize for my inability to testify at your hearings two weeks ago and ask your indulgence in allowing my comments to range over some of the areas upon which you focussed there.

In July, 1981, two months before my resignation from the Board, I testified before this Subcommittee concerning sunset and the transfer of major remaining functions to the Department of Transportation. At that time I discussed what we believed to be critical elements for the successful administration of the essential air service and international programs after sunset. Today I should like first to review these critical elements as they relate to the current DOT Plan for CAB Sunset.

In the two and a half years since I left the Board, a new set of problems has arisen which the Board had not then begun to appreciate--problems relating to the preservation of competition in a deregulated domestic air transportation system. During the past year, Congress and the Board have investigated the anticompetitive effects of control by major air lines of computerized reservations systems (CRS). And recently the Board's attention has been called to the problem of selective refusals by large carriers to interline with new, smaller air lines. Airport entry continues to be a serious potential problem.

The Airline Deregulation Act of 1978 stated clearly as a major public interest factor "the prevention of unfair, deceptive, predatory, or anticompetitive practices in air transportation, and the avoidance of (A) unreasonable industry concentration, excessive market domination and monopoly power; and (B) other conditions; that would tend to allow one or more air carriers unreasonably to increase prices, reduce services, or exclude competition in air transportation." However, the Act did not deal specifically with Section 411, the provision which empowers the Board to investigate such conduct and issue cease and desist orders to prevent it. In the second portion of my testimony I will address issues related to the preservation of competition in air transportation.

Turning first to the DOT Sunset Plan, let me recall the critical elements we described in 1981.

There are three key features of the essential air service program that are critical to its continued success. First, the system must allow for rapid, informal and flexible decisionmaking. To accomplish this objective, the Board delegated substantial initial decision authority to the employees who are responsible for the day-to-day operation of the program. Second, to assure that the communities that do not generally appear in formal Board proceedings are treated fairly, there must be an impartial review mechanism for these decisions. Third, because communities rarely appear before the Board, there must be within the agency an ombudsman who represents the views of the communities directly to the decisionmakers. In the first three years of the program, this function was performed by the Office of Community Relations. In recent years, the function has been merged into the Office of Congressional, Community and Consumer Affairs.

DOT plans to establish an Office of Essential Air Service within the Office of the Secretary. It appears that the employees who will be responsible for the day-to-day operation of the program will have substantial initial decision authority--thus allowing for rapid, informal and flexible decisionmaking. The appeal process, to be conducted by senior staff representatives from the Office of EAS, the Office of General Counsel and the Office of Assistant Secretary for Policy and International Affairs, with final decision authority in the Assistant Secretary, all appears to be substantially similar to the appeal process at the Board.

However, there seems to be no ombudsman for communities in the new DOT structure. While the essential air service program is sufficiently established in most areas of the country that a network of regional offices devoted to helping small communities with their air service problems may not be required, there continue to be serious problems in some regions--central California, for example. John Smith, in the Board's regional office in California, has performed invaluable service in helping small communities in his area to find air carriers and in representing their interests to the Washington administrators of the EAS program. Dick Steinman has performed a similar function in Alaska. I would urge that provision be made in the new DOT structure for continuation of these functions--not as part of the EAS office, but as ombudsmen outside the administrative bureacracies, reporting directly to the Assistant Secretary.

In the area of internationl aviation, my 1981 testimony described three aspects of the Board's role as an independent agency, carrying out the international programs and policies established by the legislative branch:

First, the Board has acted as an arm of Congress in working with the executive branch Departments of State and Transportation to establish the U.S. position in international negotiations of air transport agreements;

Second, the Board has exercised quasi-legislative authority in granting antitrust immunity to both domestic and internationl agreements--the IATA price coordination agreements, for example.

Third, the Board has performed quasi-judicial functions in selecting from among competing carriers for authority to operate restricted internationl routes, and regulating prices in restricted international markets.

As to the first of these functions--the Board's role as Congressional representative to balance Executive branch representation in the negotiation of international air transport agreements--Sec.17 of the International Air Transportation Competition Act of 1979 anticipates the loss of this function upon the demise of the CAB by providing for increased outside consultation in developing and implementing our internationl aviation negotiation policy. It also provides that the President shall grant to at least one representative of each House of Congress the privilege to attend international aviation negotiations as an observer if the privilege is requested in advance in writing. With the demise of the CAB, Congress might want to utilize this provision in major international negotiations to monitor implementation of the procompetitive policies it set in the Act.

The DOT Plan contemplates that the power to grant antitrust immunity will transfer, under existing law, to the Department of Justice. In previous years the CAB, the Department of Transportation and the Department of Justice had agreed that the law should be amended to transfer the function to DOT. It was generally believed that DOT's expertise in aviation would be a valuable element in any decision concerning the transportation needs which might require a grant of immunity.

This year, in an effort to avoid the risk that sunset legislation might attract amendments seeking to partially reregulate the industry, the Administration is seeking to achieve a smooth sunset transition without changing existing law. I sympathize with the Administration's goal. If sunset legislation entails a serious risk of partial re-regulation of the industry, the risk should not be taken.

In that context, I would agree with the Administration that transfer to Justice of the power to grant antitrust immunity is quite acceptable. In fact, given the recent anticompetitive activity in the industry, greater involvement of the Department of Justice in aviation antitrust issues could help restore and preserve a competitive environment in air transport. However, as I shall discuss later, I believe that some sunset legislation is required to preserve competition and that the need for this legislation outweighs any risks of reregulation.

With regard to carrier selection on restricted international routes, the DOT Plan proposes a process in which basic APA protections will be preserved--separation of functions, ex parte rules and on-the-record decisionmaking. The process seeks to insulate decision makers from political pressures by requiring a formal hearing before an ALJ, with review of his recommendation by the Deputy Assistant Secretary--a senior career official. The Assistant Secretary and Secretary would have review powers limited to either approval or remand. I assume that ex parte rules will apply to officials above the Deputy Assistant Secretary in the exercise of their review functions.

In developing this process, DOT considered a number of alternatives. In March, 1983, it sponsored a two day seminar to discuss future administration of international aviation functions of the CAB. At the Department's invitation, I presented a paper on the subject.

The paper reviewed the diversity of situations presented to the CAB in international carrier selection cases processed by the Board in the previous five year period. It recommended that a semi-autonomous modal administration be established within the Department; that the structure and procedures for carrier selection be flexible enough to deal effectively with a variety of situations and that a three member review panel be provided for so that the benefits of collegial decisionmaking in the sunshine can be retained. A copy of the paper is submitted with this testimony.

As you know, DOT has rejected the modal administration structure and plans to assign the international aviation functions to the office of the Assistant Secretary for Policy and International Affairs. I am concerned that the structure and procedures described in the DOT Plan may lack sufficient flexibility to deal effectively with the diversity of situations presented in carrier selection cases.

The CAB has been capable in recent years of making such decisions quickly on the basis of written submissions, when it was important that service be provided early--the new routes between the People's Republic of China and the United States opened in 1980, for example. Even routine processing of carrier selection cases involved only a two stage process at the Board--ALJ hearing and Board review--with a final 60 day Sec. 801 review by the President.

The new DOT Plan appears to establish a three stage process--ALJ hearing, review by the Deputy Assistant Secretary, then review by the Assistant Secretary or Secretary--with the same final 60 day Sec. 801 review by the President.

The planned structure does not appear to permit any decision without an oral evidentiary hearing before an ALJ. As Richard Berg of the Administrative Conference of the United States pointed out in his paper at the DOT seminar last year, the DOT may be required to use an ALJ for every case because it is doubtful that the "initial decision" function can be delegated by the Secretary to a subordinate who is not an ALJ. At present, the Board can itself make an initial decision upon written submissions; in the new DOT structure, this flexibility appears to be lost. And if the Secretary can review decisions, there appears to be no reason to retain 60 day Sec. 801 review.

With regard to insulation, I continue to believe that government in the sunshine adds an important dimension when the government is handing out valuable exclusive commercial rights; and I would thus continue to suggest that the type of three member review panel described in my DOT seminar paper be adopted.

With regard to the transfer of personnel from CAB to DOT for the performance of international functions, I would urge that we take care to preserve the institutional memory of the Federal government, and to retain sufficient capability to efficiently implement our continuing international regulatory responsibilities.

In my three years at the Board I came to appreciate the importance of the Board's career staff in providing institutional memory in international matters. When we sat down to negotiate with other governments, their chief negotiators were usually career officials with deep knowledge of international aviation matters and long experience in the field. The U.S. team negotiators seemed to change every two to four years. We found the background information and experience of our career staff to be invaluable.

On the regulatory side, it is most important that staffing be adequate to assure timely review of filings. When new tariffs are submitted, they are deemed approved unless suspended within a limited number of days, usually 15. This suspension power can be an important factor in dealing with governments which are discriminating against U.S. carriers.

I turn now to the new problems which threaten the continuation of competition in air transport.

During 40 years of economic regulation, the focal point of government involvement in the airline industry was "the public interest." With deregulation, Congress and the American public have decided that the airlines can better achieve efficiency and price and service levels responsive to public needs from the interplay of competitive market forces, than from the "public interest" decisions of government officials.

During the first four years after deregulation, it appeared that the airline industry was becoming functionally competitive. Entry barriers were low and carriers did not appear to be able to hold prices much above economic costs for any length of time.

However, continuation and development of this new competitive environment is being threatened by structural remnants of the 40 years of regulation. Monopoly control of computer reservations systems by a few major airlines is being used to impair reasonable access to potential travelers by competing carriers. The strong positions of incumbent airlines at major airports have already caused access problems for new entrants, and threaten to be a more serious problem as airports become more congested. Selective refusals to interline by entrenched major carriers threaten some new entrants. In recent months, smaller carriers have charged that unfair trade practices by larger carriers have proliferated. Unless steps are taken to protect competition, the basic premise of deregulation may be seriously undermined.

Federal law establishes two basic methods for preserving marketplace competition--antitrust litigation under the Sherman and Clayton Acts, and regulatory control to prevent unfair trade practices and unfair methods of competition. Section 5 of the Federal Trade Commission Act empowers the FTC to exercise this authority with regard to most industries. Air transportation is specifically excluded from Section 5. Section 411 of the Federal Aviation Act grants to the CAB the authority to prevent unfair competition practices with regard to air transport.

The recent CRS investigations by the CAB and the Department of Justice have focussed federal attention on the potential for anticompetitive abuses inherent in the control by a few major carriers of the system by which most airline tickets are marketed. The CAB, pursuant to its powers under Sec. 411, has recently proposed a comprehensive set of regulations to try to limit these abuses. Adoption and enforcement of these regulations is imperative if we are to retain a competitive air transport system.

The DOT Sunset Plan assumes that when the CAB sunsets, Section 411 will lapse and Section 5 of the Federal Trade Commission Act will automatically give the FTC the powers which the Board now exercises under Section 411. This assumption is widely disputed in the industry. I understand that the FTC itself disagrees with DOT's conclusion. In any event, unless clarifying legislation is enacted, all regulations adopted by the CAB under Section 411 will terminate at sunset. Even if Section 5 did automatically adjust at sunset to include air transportation, the CRS rules will terminate in the absence of new legislation. In order to deal with CRS, the FTC would have to begin again the rulemaking which has already taken the CAB fifteen months and which will probably consume three additional months before rules are finally adopted.

Other potentially anticompetitive activities have recently been called to the attention of the CAB--selective refusals of major carriers to interline with smaller airlines, and refusals by the airline operators of CRS to display connecting flights of airlines with special feeder agreements in a manner which would inform the public of the advantages of the arrangement. I am certain that as time goes on, problems of this nature will continue to arise.

Three years ago, I believed that, with deregulation, the consumer protection and unfair trade practice jurisdiction over air transportation should be transferred to the FTC. Recent experience and more considered reflection on the issue have led me to conclude that these functions should be transferred to the DOT.

The air transport system involves a network of inter-related services. Decades of government regulation led to a highly structured air transportation industry in the United States. Market power was concentated in relatively few carriers. Now that competition has been substituted for government regulation to discipline the price and quality of services offered to the public, it is crucially important that competition be preserved. Civil antitrust litigation is not sufficient to ensure such preservation--such litigation is expensive and can require years for processing. Small airlines don't have the resources to prosecute such cases, and still continue their air service operations.

Regulatory oversight is necessary to prevent unfair and anticompetitive trade practices. The regulatory history of the industry, the networking characteristics of air transport and the remaining regulatory functions of the government in air transport, lead me to conclude that the agency which will have the primary federal expertise in commercial air transport should inherit the Section 411 functions. I would urge that legislation be enacted to transfer to the DOT the consumer protection and unfair trade practice functions now exercised by the CAB under Sections 404 and 411.

With regard to airport access, current law does not clearly allow civil actions to enforce federal laws and agreements which require airport operators to accommodate new entry. In previous years the CAB has urged this Subcommittee to grant a private right of action to airlines to enforce these laws. Establishment of such a right would help avoid airport entry problems in the future.

In summary, I continue to believe that a modal administration within the Department of Transportation could best administer tranferring CAB functions. In general, though, the DOT Plan which concentrates authority over these functions in the Assistant Secretary for Policy and International Affairs does not appear to be unworkable. I would hope that the flexibility which has allowed the Essential Air Service program to function effectively at the Board will be retained, and that an ombudsman will be provided to help small communities with their problems.

The new organization and procedures for international carrier selection appear to be more cumbersome than current procedures at the Board. There should be room for expedited process on the basis of written submissions, and with Secretarial review, Section 801 Presidential review should be eliminated.

I strongly endorse Chairman McKinnon's statement to this Subcommittee concerning CAB staff. The Board performs a great deal of work with an unusually small staff of excellent people. I hope there will be no questions concerning the transfer of these people so that they can continue their outstanding work at DOT and Justice.

Finally, there is a critical need to adopt legislation continuing the consumer protection and unfair trade practices functions concerning air transportation which are now implemented by the CAB. While these functions and the current CAB regulations which govern these areas could be transferred to the Federal Trade Commission, I would recommend transfer to DOT so that they can be implemented as part of the Department's continuing general jurisdiction over air transportation.

Thank you for the invitation to testify on these matters. I will be happy to answer questions.

POST-SUNSET ADMINISTRATION OF INTERNATIONAL AVIATION FUNCTIONS AT DOT

A Paper Prepared for the U.S. Department
of Transportation CAB Sunset Seminar

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February 22, 1983

Post-Sunset Administration of International Aviation Functions at DOT

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Stroock & Stroock & Lavan

INTRODUCTION

On January 1, 1985, the international aviation functions of the Civil Aeronautics Board will transfer to the Department of Transportation. In this CAB Sunset Seminar, DOT is examining alternative organizational structures and processes for the administration of the transferring functions. These functions include:

(1) Carrier selection on limited-entry routes.

(2) Participation with the Department of State in bilateral and multilateral air transport negotiations.

(3) Administration of laws and regulations designed to protect U.S. carriers against discrimination and unfair competitive practices in foreign air transportation.

(4) Regulation of pricing in U.S.-foreign markets.

(5) Licensing of U.S. and foreign carriers in foreign air transportation.

(6) Collection of traffic and financial information concerning international air transportation.

It is also probable that antitrust review of carrier agreements relating to foreign air transportation will be assigned to DOT rather than the Justice Department.

The primary focus of this seminar has been administration of the carrier selection function after sunset. Other participants have described and discussed the current quasi-judicial processes at the CAB and the need for ex parte and separation of functions rules to assure basic procedural fairness. Some suggest that carrier selection in limited-entry routes can be made through a form of auction or lottery. Others urge replication at DOT of full CAB quasi-judicial processes.

This paper will first outline the statutory policy framework within which international aviation decisions must be made. It will then recommend alternative organizational structures and related processes for carrier selection within DOT which would tend to provide procedural fairness, efficiency, insulation from political pressure, and most importantly, effective implementation of the goals and policies set by Congress for international aviation. Finally, the paper will discuss the integration of structure and process for all of the transferring international aviation functions.

THE STATUTORY MANDATE FOR INTERNATIONAL AVIATION

In the International Air Transportation Competition Act (IATCA) of 1979, 94 Stat. 35, Congress extended to foreign air transport the pro-competitive philosophy of the Airline Deregulation Act (ADA). 92 Stat. 1705. It instructed the Secretary of State, the Secretary of Transportation, and the CAB to develop a negotiating policy which "emphasizes the greatest degree of competition that is compatible with a well-functioning international air transportation system." 49 U.S.C. Sec. 1502(b).

The Act lists the "public interest" factors which should guide the CAB (and after sunset, DOT) in implementing its international aviation functions. Prominent among these are:

- Placement of maximum reliance on competitive market forces and on actual and potential competition -- taking account of material differences, if any, between domestic and foreign air transportation.
- Development and maintenance of a sound regulatory environment which is responsive to public needs and in which decisions are reached promptly.
- Availability of a variety of adequate, economic, efficient, and low-price services by U.S. and foreign carriers.
- Strengthening the competitive position of U.S. air carriers to at least assure equality with foreign air carriers. 49 U.S.C. 1302(a).

The Act also strengthened and placed additional emphasis upon the powers of the CAB to deal with unfair competitive practices and discrimination by foreign governments and carriers in foreign air transportation. 49 U.S.C. 1159(b).

The array of functions in international aviation which will transfer to DOT in 1985 are interrelated -- tools to achieve the international aviation system sought by Congress. In considering a structure and process for carrier selection, applicability to the performance of other transferring functions should be considered. And the experience, information, and expertise developed in the performance of all of these functions should be integrated into the broader function of refining and implementing this country's international aviation negotiating policy.

STRUCTURAL RECOMMENDATIONS

To effectuate our international aviation policies in a manner consistent with due process, I suggest that a modal administration or agency be established within DOT to perform transferring CAB functions. The head of this agency should be either:

- A three-person commission of Presidential appointees with staggered four-year terms (comparable to FERC within DOE), or

- An Administrator and Deputy Administrator appointed by the President and confirmed by the Senate.

An oral evidentiary hearing conducted by an ALJ should be available for use when needed. Non-hearing process should also be available, either before an ALJ or before the ultimate decision-maker. Sanford Rederer's recommendations for streamlining the process are sound and should be adopted. Where the differences between applicants are slight, a form of lottery should be employed. Ex parte and separation of functions rules should apply to the entire process.

The Department of Transportation encompasses a number of ongoing Federal transportation programs. The implementation of these programs is accomplished through modal administrations -- the FAA, NHTSA, FRA, MARAD, Coast Guard, and the Federal Highway Administration. The Office of the Secretary is not structured to administer modal programs. No one seriously suggests that the transferring CAB functions be absorbed into the FAA. The most efficient structure for these functions would be a new modal administration or agency within DOT.

Such an agency would perform a number of important quasi-judicial functions, such as carrier selection in limited-entry international markets, carrier selection in essential air service cases, adjudicating complaints under the International Air Transportation Fair Competitive Practices Act, and conducting pricing investigations and consumer protection enforcement cases. These functions should be insulated from political interference.

Insulation of the carrier selection process is important both to preserve procedural fairness and to further our international aviation goals and policies. To the degree that the term "politics" means particular policies or strategies in the pursuit of national goals, politics can play a legitimate role in all aspects of the implementation of international aviation functions. However, when "politics" means favoring particular airlines because of the support they gave certain candidates or making a carrier selection decision in order to gain political support in Congress for other programs, procedural fairness and our international aviation policies are violated — to the ultimate detriment of the public interest and the entire political system.

Richard Dyson, Associate General Counsel at the CAB, has suggested that there are at least four separate types of insulation that may be built into a government organization:

(1) Evidentiary insulation -- procedural rules such as the ex parte and separation of functions rules.

(2) Supervision and tenure insulation -- protection of the decision-maker from pressure from his boss.

(3) Review insulation -- protection from reversal of the decision by higher levels of government.

(4) Staff insulation -- the power of the decision-maker to choose and supervise staff.

To achieve these elements of insulation within DOT for the transferring CAB quasi-judicial functions, a semi-autonomous modal administration should be established at DOT to implement the transferring functions. *Ex parte* and separation of functions rules can provide some insulation. The use of ALJs can also be important. But structural independence would clearly be the most effective form of insulation.

If the agency head were not a Presidential appointee, and his decisions were subject to Secretarial review, insulation from political interference would not be possible. Some have suggested that the Secretary could promulgate criteria for carrier selection by rule-making. After adoption of the rule, he would then be bound to these criteria and insulated from political pressure in reviewing carrier selection decisions. However, the diversity of carrier selection situations is such that any formulation of standards for decision-making would have to be broad. This would leave wide discretion for the weighing of various factors in individual selection cases. A competent General Counsel could write an opinion justifying nearly any decision.

Lack of independence could also seriously impede administrative efficiency. In a number of carrier selection cases, the CAB has used an expedited non-hearing process in which applicants made only written submissions. These were analyzed for the Board by its staff, and applicants were given the opportunity to argue directly to the Board. The entire process was completed within six to twelve weeks.

If carrier selection decisions at DOT are to be reviewable by the Secretary, it appears that all such cases may have to be heard initially by ALJs. As Richard Berg points out in his paper, only an agency head or an ALJ may make the initial decision in a quasi-judicial case. Under the Administrative Procedures Act, it is doubtful that the Secretary can delegate this function to a subordinate who is not an ALJ. Consequently, while the CAB has been able to process non-hearing cases when quick decisions were necessary, the new agency at DOT may not be able to do so unless the Secretary hears the case, or the agency head is given final authority in his area, independent of the Secretary.

To achieve effective insulation within DOT for the transferring CAB quasi-judicial functions, the modal administration established to implement these functions should be headed by one or more Presidential appointees confirmed by the Senate. And its quasi-judicial decisions should not be reviewable by the Secretary.

The agency head could either be a three-member commission -- similar to FERC within DOE, or an Administrator (and Deputy Administrator) -- similar to the FAA. Just as the safety decisions of the FAA Administrator are not subject to review by the Secretary, the carrier selection and other quasi-judicial decisions of the head of the new agency should also be nonreviewable by the Secretary and appealable directly to the courts.

The three-member commission would have some advantages. It would assure that decisions were made in open meetings. In the years prior to the Government in the Sunshine Act (5 U.S.C. § 552b), the CAB made carrier selection decisions in closed meetings from which staff was often excluded. Criteria were not clearly expressed. Veteran CAB staff members recall that the General Counsel often had to write orders justifying the Board's decisions without ever knowing the actual reasons for the choices.

The open public meetings and discussions which now occur at the Board tend to force the members to articulate reasons for their decisions -- and to base their positions on expressed interpretation of the evidence and substantive policy judgments. The open meeting requires that members be prepared to defend their positions in public discussions with staff and other members. While compliance with open meeting requirements can inhibit frank interchange of ideas among members and make compromise more difficult, I found during my three years at the Board that the benefits outweighed the difficulties.

Another advantage of a three-member agency head would be the diffusion of authority. The collegial process would tend to prevent abuses of power by one decision-maker, and would subject his or her ideas to testing and questioning by the other members.

On the other hand, many of the functions transferring to DOT do not require quasi-judicial process. And the agency need not be completely insulated from policy direction by the Secretary. In such areas as consumer protection, fitness licensing, reporting and data collection, and essential air service determinations, there would probably be no advantage in having a three-member body. An Administrator's decision, reviewable by the Secretary, could efficiency implement Executive Branch policies in these areas.

Maximum structural flexibility could be achieved if Congress provided for a review board composed of the Administrator, Deputy Administrator and an Assistant Secretary appointed by the Secretary to review ALJ recommended decisions in carrier selection cases, to decide non-hearing carrier selection cases, and to determine other quasi-judicial matters.

This would allow the benefits of collegial decision-making and government in the sunshine for carrier selection cases. It would allow the Administrator to handle matters which did not require these elements. And it would achieve a degree of insulation from political influence, yet allow policy considerations from the Office of the Secretary to be a part of the decision-making process. The flexibility such a structure would allow could also be helpful in the performance of other international functions.

Some commentors have suggested that carrier selection can be accomplished by ALJs, with decisional review by an Assistant Secretary -- all acting pursuant to criteria established by the Secretary through formal rule-making. As a practical matter, however, carrier selection situations are too diverse to be effectively handled by detailed criteria.

THE CARRIER SELECTION FUNCTION

Before Congress adopted the IATCA in early 1980, its mandate to the CAB for carrier selection on international routes was so broad as to justify nearly any selection the Board might make. Major factors cited by the Board in making selections prior to the middle and late 1970's were historic identity in the market, diversion, carrier strengthening, route strengthening, service proposals, and competitive strength against the foreign carrier.

As the domestic deregulation movement gained momentum in the middle and late 1970's, competition and open entry were given greater emphasis in international aviation. A number of new bilateral treaties opened some international markets to multiple entry. Where limits on entry forced the Board to select carriers for particular routes, the Board started to focus its selection criteria on competitive considerations. At first, proposals for low fares carried the most weight in the selection process. Recently, the emphasis has shifted to market structure.

In the past five years, the CAB has processed approximately 25 international limited-entry carrier selection cases -- an average of five per year. Seven of these cases resulted from the Bermuda II Agreement with the United Kingdom, under which the U.S. may select one new gateway to London per year (from 1980 through 1984), and select one carrier to serve from that gateway. After 1984, gateway cities may be changed on three months' notice. Carrier selection decisions for the new gateways to London have emphasized inter-gateway competition and low fares.

Two of the most successful selectees have been Delta at Atlanta and Northwest at Minneapolis/St. Paul -- carriers with strong feed into the gateway. Until rapid expansion got it into trouble, Braniff did quite well in its Dallas/Fort Worth-London service.

Western was chosen at Denver primarily on the basis of its low fare proposal. Order 80-7-190, Docket 37865. As it developed Salt Lake City rather than Denver as its hub, Western was unable to maintain enough traffic for Denver-London service and abandoned the market. At Newark, the Board is emphasizing competitive market structure -- seeking to assure that a low-fare carrier is available in the New York region as an alternative to TWA and Pan Am at JFK. Docket 39634.

The U.S.-Mexico bilateral establishes a number of U.S. gateways to groups of Mexican tourism points. Carrier selection for these markets involves destination competition (Merida v. Acapulco, for instance), as well as inter-gateway competition. Carrier choice in these markets can also determine the region of the country which will receive convenient service. In the Dallas/Fort Worth-Yucatan case, for example, Texas International was chosen over American Airlines because it offered service from the Midwestern region behind Dallas. Order 81-1-83, Docket 38939.

Similarly, in the New Gateways to Brazil case, the Board was aware that Brazil might accept only one additional carrier from one new gateway. It selected Dallas/Fort Worth (and American Airlines) as the gateway most likely to provide new service opportunities because of the large number of cities behind it. Order 81-11-137, Docket 39251.

The Canadian bilateral also limits the U.S. to one carrier from each gateway and involves carrier selection issues similar to issues in the Mexican route cases. An important difference is that most Mexican routes involve tourism travel and lower fares are permitted. Since proposals for low fares are probably more likely to win approval from the Mexican government than from the Canadian government, such proposals can be given greater weight on routes to Mexico.

Where a market is served by a number of carriers on a variety of routes, new or weak carriers can be given opportunities without the risk of inferior service to travelers. In severely limited, thin markets such as U.S.-China, the route strength of our carrier is an important factor — ability to carry intermediate, behind, or beyond traffic.

In a small market such as New York-Ottawa, a large carrier may propose service that fits its own system but provides inferior travel opportunities, while a small carrier might focus its service proposal on travelers' needs in the market. In that case, Pilgrim proposed convenient morning and evening flights in turboprop aircraft and was awarded the route over large carriers which did not offer timely service. Order 81-12-159, Docket 39870.

In summary, the diversity of carrier selection situations requires the exercise of policy judgment and defies strict codification of criteria by rulemaking. The criteria for choice varies depending upon the differing characteristics of the route or the bilateral.

Occasionally, though, the selection has narrowed to two or three carriers who appear to be equally qualified to serve the route, whose service and fare proposals are closely comparable, the selection of any of which would be equally pro-competitive. The differences among such "finalists" have sometimes been less than the margin for error in the decision-making process. In such situations, a random selection process among the finalists should be used. It would be no less pro-competitive than deliberate selection; it would be more fair to the finalists than a deliberate selection based upon a minor and probably immaterial difference; and it would avoid the misleading perception that the final selection criterion was a matter of real importance to the decision-maker.

It would appear that future carrier selection cases will not differ greatly from the diversity of recent cases discussed above. The volume of future cases will depend upon the degree to which:

- Incumbent carriers must be replaced, either because of bankruptcy or failure to obtain renewal of their temporary or experimental certificates.

- Agreements with our aviation partners are liberalized.

Since early 1979, the Board has awarded short-term, experimental certificates on limited-entry international routes. These certificates, recently extended by Congress from a three- to five-year duration, usually require the carrier to file initial tariffs at levels no higher than it proposed in the route case. The purpose of the certificate is to determine whether the carrier's projected services, low fares, efficiencies, and other projected results will materialize and remain for a sustained period of time. Most of the certificates will expire after January 1, 1985 — some very shortly after CAB sunset. DOT, probably in cooperation with the CAB, will have to decide soon whether the carrier's performance under each of these certificates will be reviewable.

Last July, the CAB gave advance notice of a proposed rule-making, PSDR-78, Docket 40823, which invited comments on this issue. Many commenting carriers urged that certificates of indefinite duration be issued, subject to revocation only after an oral evidentiary hearing has established that the carrier's existing service (including fares) is inexcusably unsatisfactory and that another carrier will provide better service. Commenting communities and a few carriers urged retention of the five-year certificate and adoption of a review process.

If service and fare proposals are to be factors in future carrier selection cases, periodic review of the selected carrier's performance will be necessary. The Board has limited powers to enforce carrier service and fare proposals. The only effective way to achieve a degree of compliance is the threat of periodic review. Of course, in markets that are functionally competitive, such review may be unnecessary. But where the foreign government closely controls fares and seeks to limit capacity, U.S. enforcement of service and fare proposals by periodic reviews can help protect the public against monopoly abuses. To avoid excessive administrative burdens, such reviews could be limited to situations in which formal complaints are filed. Even a small number of review cases would preserve the disciplinary effect of the threat of compliance review.

The suggestion in this seminar that cash auctions and lotteries be used to award limited-entry certificates assumes that fare and service proposals mean little. While the importance of such proposals has been exaggerated in some carrier selection cases, they do serve a useful purpose. Such proposals indicate the manner in which the planned service will be integrated into the carrier's existing route and fare structure. From this, a decision-maker can compare the relative public benefits of competing proposals and make at least a rough judgment as to which would better serve the public. The credibility of such proposals would be seriously weakened if no threat of review existed.

Unless cash auctions or lotteries are adopted as the carrier selection method for limited-entry routes, it will probably be necessary to establish a quasi-judicial review process for experimental certificates. While a lottery procedure might be employed to a limited degree in the carrier selection process, neither it nor an auction can be used to the total exclusion of deliberate selections. Judgments must be made concerning each carriers' capacity to serve a route and some applicants must be excluded in order to avoid concentrations of market power. The application of even these two criteria will require quasi-judicial process.

It can also be anticipated that over time some bilateral agreements will be modified, allowing more carriers to serve existing routes or creating new limited designation routes. And some carriers will abandon routes, either because of insolvency or because the routes no longer fit their systems. Both occasions will give rise to new carrier selection cases.

While the number of carrier selection cases may decline in the future, the combination of factors described above will assure that cases -- and probably major cases -- will occur after 1984.

TARIFFS

To a large degree, the consideration of international tariff matters is routine. In IATCA, Congress established a zone around a standard foreign fare level in each market and restricted the power of the CAB to suspend tariffs within that zone. 49 U.S.C. 1482(j). Fares outside the zone are, however, subject to suspension. Most foreign governments have an unrestrained power to reject tariffs filed by our carriers. Sometimes, the exercise of our tariff suspension powers is an important tool in helping our carriers to obtain tariff approvals from other governments.

During the current world recession, with international carriers losing money, it is easy to forget that in prosperous times carriers in limited-entry markets can, in the absence of regulatory controls, charge high fares and garner substantial monopoly rents. When the recession is over, the exercise of control over U.S. carrier fares will be important in noncompetitive international markets.

Tariff problems can occasionally require quasi-judicial hearing process. Currently pending before an ALJ at the CAB are complaints by foreign carriers that the Visit U.S.A. fares of our carriers are discriminatory and violate bilateral agreements.

INTER-CARRIER AGREEMENTS

While the ADA currently provides that the power of the CAB under Section 412 of the Federal Aviation Act to review and immunize agreements among air carriers from antitrust liability is to transfer to the Justice Department at sunset, it is generally anticipated that the function will instead be transferred to DOT.

Agreement review has been the subject of serious controversy in recent years as the CAB has reviewed the IATA agreements and the Air Traffic Conference (ATC) agreements to determine the extent to which antitrust immunity should be maintained. While review of inter-carrier agreements does not always require oral evidentiary hearings, factual determinations are sometimes needed and availability of ALJs and hearing process would afford the decision-maker maximum procedural flexibility.

The review of inter-carrier agreements and the administration of international pricing policy are functions which could be performed by an Administrator under the Secretary's direction and review. However, since these are some of the activities in which carriers and other special interest groups seek to exert the greatest political pressures for resolutions that favor their particular interests, it would be preferable to insulate these functions by vesting final decisional authority in a commission or board.

ANTI-COMPETITIVE PRACTICES COMPLAINTS

Under the IATCA, airlines may file formal complaints with the CAB concerning discrimination, anti-competitive practices, or unreasonable restrictions on market access by foreign governments or foreign carriers. If such practices are proven, the Board has broad retaliatory powers, subject to Section 801, Presidential review. 49 U.S.C. 1159b. Affected carriers and foreign airlines must be given notice of a complaint and opportunity to file written evidence and argument. The Act requires that the Board set each complaint for hearing or investigation, or institute other proceedings proposing remedial action within 60 days after receiving the complaint. The period for taking action may be extended in 30-day increments, but action must be taken on the complaint within 180 days of its receipt.

The independence of the Board has enabled the Executive Branch negotiators to use the possibility of severe Board action as an important negotiating tool. If the review board described above were to exercise the Board's current powers under the International Air Transportation Fair Competitive Practices Act, this negotiating tool might be preserved. At the same time, the presence of an Assistant Secretary on the review board would assure that the Secretary's policy concerns were fully expressed.

INTERNATIONAL AIR TRANSPORT NEGOTIATIONS

A key element of our international aviation program is the formulation of negotiating positions and strategies for bilateral and multilateral negotiations. Meetings are held with carriers, city representatives, and other interested parties before each major negotiation. Often the interests of our airlines are in conflict with one another. Sometimes carrier interests diverge from the broader public interest. Under the current tripartite structure, DOT, CAB, and the Department of State share the responsibility for international aviation negotiations.

DOS plays multiple roles -- it seeks to avoid problems with other governments in the context of its larger international relations responsibilities; it attempts to accord aviation policy with its general international economic policy; and it acts as a "hired gun" in representing the interests of DOT and the CAB in the particular negotiation.

The CAB and DOT have played differing roles over the years. During the early 1970's, the CAB appeared to be representing U.S. carrier interests, while DOT provided the broader public policy perspective. In the later 1970's, these roles were reversed.

The tension between the two agencies has generally been an important factor in the development of our negotiating positions. Since international aviation negotiations are so important to the involved U.S. carriers, their Washington representatives devote substantial energy to assuring that their interests do not go unrepresented at the negotiating table. If the CAB or the Executive departments are not responsive to their concerns, they will seek assistance in Congress.

Since U.S. carrier interests and the broader public interest are not always coincident, both should be well represented in the development of negotiating positions. If the new agency at DOT is directly under the supervision of the Secretary, the constant pressures from carriers will tend to cause the agency and DOT to focus most strongly on U.S. carrier interests. If the new agency is semi-autonomous, the constructive tension between the agency and the Office of the Secretary will tend to assure that the broader public interest is also fully considered.

SUMMARY

Upon sunset of the CAB, a diverse group of international aviation regulatory functions will transfer to DOT. In order to insulate against the direct political pressures that usually exist in a Cabinet-level agency, a semi-autonomous administration should be established within DOT to perform these functions. In addition to insulation from political interference, such an administration would tend to assure constructive diversity of views in the development of negotiating policy. It would also allow the Office of the Secretary to separate itself somewhat from threatened retaliatory actions against foreign carriers as the result of anti-competitive practice complaints.

The head of such agency could be either a three-person commission appointed by the President, or a Presidentially appointed Administrator and Deputy Administrator. A review board consisting of the Administrator, Deputy Administrator, and an Assistant Secretary would offer the benefits of collegial, open decision-making on quasi-judicial matters and the efficiencies and policy consistency of the single Administrator for other matters.

DOT should preserve as much procedural flexibility as possible, consistent with fairness and due process requirements. The administrative structure and processes should be capable of dealing effectively with a variety of situations. Implementation of the Congressional mandate to enlarge competition in a manner compatible with a well-functioning international air transportation system will be a challenging responsibility in the next decade.

The potential for real progress in this effort will be enhanced if a semi-autonomous agency is established within DOT to perform transferring international aviation functions, collegial decision-making is available, quasi-judicial processes are streamlined, and decision-makers are insulated from political interference.

Mr. MINETA. Please proceed.

TESTIMONY OF MARVIN S. COHEN, FORMER CHAIRMAN, CIVIL AERONAUTICS BOARD, 1978-81

Mr. COHEN. Thank you, Mr. Chairman.

I appreciate the invitation to testify today.

I deal with two areas in my prepared statement. One is the transfer of CAB functions to the Department of Transportation. And in that portion of the testimony I review my final appearance before this committee as Chairman of the CAB, back in 1981, and the elements that I suggested might be considered with regard to sunset at that time. Then I compare those concerns to the current DOT sunset plan; how well that plan deals with some of those issues. And I have some suggestions in that regard.

The second part of my testimony deals with competitive concerns and the new developments in the past 2 or 2½ years that threaten competition in the air transportation industry. There is a critical need, I believe, for the preservation of section 411, and the transfer of the 411 duties and functions to another agency of Government by legislation.

I suggest there that the transfer should be made to the Department of Transportation, rather than the Federal Trade Commission. This is something of a change from my prior position and prior testimony. And I will explain that.

First, dealing with the DOT's sunset plan, in 1981 I first discussed the essential air service program and suggested that there were three key features of that program that should be preserved in the transfer of functions. One was the ability of the staff implementing the essential air service program to make rapid, informal, and flexible decisions. That meant a delegation of substantial authority to staff.

The second was a concern that the communities be treated fairly and have an impartial review mechanism for the decisions of staff.

And the third was the concern that communities be represented by an ombudsman before the decisionmaker because communities are rarely in a position to have representation in Washington to express their views.

The DOT plan to establish an office of essential air service within the Office of Secretary I think meets most of those concerns. It appears to have the potential for rapid, informal, and flexible decisionmaking; I assume that the office itself, being attached to the Secretary's office, will have substantial initial decisionmaking authority. The appeal process seems to involve outside elements of the Department, similar to the process in the CAB—that is: representatives of the Office of Essential Air Service, the Office of General Counsel, and the Assistant Secretary for Policy and International Affairs.

I found no provision for an ombudsman for communities in the DOT plan. That need is not as great as it was 3 years ago, but there are some portions of the country having serious essential air service problems, particularly central California, as I am sure you are aware.

John Smith represents the Board now, in that area, and performs a very essential function, just as Dick Steinman ably represents the Board in Alaska.

I think those functions, relating to the ombudsman role, should be preserved, that outside the Office of Essential Air Service DOT should have someone speaking for the communities directly to the decisionmaker, the Assistant Secretary for Policy and International Affairs, the de facto new Administrator of Civil Aviation, under the plan.

In the international area, in 1981, I described three aspects of the functions of the CAB as an independent agency, in carrying out international programs and policies. First, acting as an arm of Congress, in working with the executive branch, Department of State and Department of Transportation, to establish U.S. positions in international negotiations.

The second was the exercise of quasi-legislative authority, such as the granting of antitrust immunities to both domestic and international carrier agreements such as the IATA price coordination agreement.

Third, the quasi-judicial functions which have received a great deal of attention over the past year—that is, selecting from among competing carriers for authority to operate restricted international routes and regulating prices in international aviation.

As to the first of these functions, representing Congress in international negotiations, the International Air Transportation Competition Act of 1979 took account, I think, of the impending demise of the CAB by providing for increased outside consultation in developing international negotiating positions. It specifically provided a role for Congress, that is, that one representative of each House could, upon written request, sit in on negotiations.

With the demise of the CAB, I might suggest that Congress might want to utilize this provision, with regard to major international negotiations, to monitor implementation of the procompetitive policies set forth in that act.

With regard to the quasi-legislative functions, the DOT plan contemplates that the power to grant antitrust immunity will transfer, under existing law, to the Department of Justice. Previously, the CAB, the Department of Transportation, and Justice Department had agreed that this power should go to DOT. I understand that because of its concern about reregulation of air transportation, the administration does not want to have new sunset legislation and therefore is content to have this power transferred to DOJ.

I find nothing to argue with there. I think such a transfer is acceptable and I honor their concern about the risk to reregulation. I share that concern and would hope that new legislation would not attract new reregulating provisions. However, as I will discuss later, I believe that some sunset legislation is imperative and the need for it outweighs any risk of reregulation. That new legislation should deal with section 411 particularly.

Finally, with regard to carrier selection on international routes, the DOT plan proposes a process which preserves the APA protections of separation of functions, ex parte rules, and on-the-record decisionmaking. It does seek to insulate decisionmakers from political control by granting the initial decision power to an ALJ and the review power to a Deputy Assistant Secretary, with limited review powers in the Secretary and Assistant Secretary.

I assume that ex parte rules will apply to the Secretary and the Assistant Secretary in the exercise of these review functions.

As you know, DOT considered a number of alternatives. It held a 2-day seminar in March 1983 to consider a number of alternatives for implementing this new carrier selection function. I was asked to present a paper there. A copy of that paper is attached to my testimony. That paper recommended that a semiautonomous modal administration be established within DOT, with a Presidentially appointed Administrator and Deputy Administrator. It recommended that the structure and procedures for carrier selection be flexible enough to deal effectively with a variety of situations and to deal quickly with carrier selection when necesesary.

It proposed a three member panel for review of decisions, in order to preserve the benefits of Government in the sunshine.

DOT has rejected the concept of the modal administration and plans to assign these functions to the Office of the Secretary, as you know. I am concerned that the new DOT procedures may lack sufficient flexibility to deal effectively with the diversity of situations presented in carrier selection cases.

In recent years, the CAB has been able to act quickly when it needed to, in these situations. When a new route opened up to the

People's Republic of China, a new carrier was selected—I believe—in 3 months to provide that service. I believe the record time for completing a carrier selection case on written submissions was less than 2 months.

CAB had a two-stage process, followed by a Presidential section 801 review.

The new plan would be a three-stage process with an ALJ hearing, review by a Deputy Assistant Secretary, another review by the Secretary, then followed by the 801 Presidential review. I do not see any provision for decisions on the basis of a written record without an oral hearing. That is a loss of flexibility.

With regard to insulation, the APA protections establish a great deal of insulation. I prefer a semiautonomous modal administration. It would do a better job in that area. I regret the loss of the collegial process and Government in the sunshine where decisions would be made in front of the public.

There is one more thing I would like to touch on in this area before talking about competition. That is the staff at the CAB.

In the years I spent at the CAB, I came to appreciate the importance of the institutional memory in the career staff members in the agency, particularly in the international area.

In international negotiation sessions, we usually found that the country across the table was represented by a team with many years of experience and depth of understanding and expertise in international aviation.

The team leaders for our negotiating teams seemed to change every 2 or 4 years and the institutional memory was only in the career staff people, most of them at the CAB. I would hope that those people would be retained in the transfer of functions. Otherwise, the U.S. international aviation system will lose a very valuable resource.

In the area of regulation, it is important that our international regulatory offices be well staffed. If we are to perform those functions on a timely basis, the Government has to have the people to do it.

When tariffs are filed, I believe there is generally a 15-day period for suspension. The right to suspend tariffs can often be an important lever against the Government that is discriminating against our carriers. In international aviation, we cannot afford to miss any of those deadlines.

Now let me turn to the problems that threaten competition in air transportation. During 40 years of regulation the focal point of Government involvement in aviation was the public interest. With deregulation in 1978 we switched the focus to competition. The Government and the public are now relying on competition to discipline price and service in air transportation.

It is imperative that competition itself be preserved in this industry. In the first 4 years after deregulation, it appeared that the industry was becoming functionally competitive. Entry barriers were low and carriers did not appear to be able to hold prices substantially above cost for any length of time.

In the past year and a half, we have seen a number of problems develop, the most obvious of which has been the computer reservation system, control and dominance by major carriers and the use of that dominance and control to disadvantage their competitors.

This problem has received the attention of Congress and of the CAB and while it has taken about 15 months so far, it appears that regulations will be adopted under section 411 by the CAB to address this situation. These regulations may be adopted in another 3 months, a total of about 18 months to finalize them.

There are other problems on the horizon. Some smaller carriers have complained to the CAB about selective refusals to interline by major carriers. Some carriers have recently complained to the CAB about the attempted exclusion from the CRS system of information involving intercarrier agreements that make it easier to interline between two carriers; major carriers are using their control of CRS to try to inhibit that practice.

I am quite certain that carriers are going to develop new and imaginative other ways to take business away from their competitors and I am quite concerned that some of them could be grossly anticompetitive and could harm competition in air transportation.

It is important that we retain a Government ability to deal with this. The two ways the Government deals with the preservation of competition are through court cases under the Sherman Act and the Clayton Act and through regulation under section 5 of the Federal Trade Commission Act and section 411 of the Federal Aviation Act.

The DOT sunset plan assumes that while 411 will terminate, the FTC will retain residual power to deal with these problems under section 5, notwithstanding specific language in section 5 that excludes air transportation from the jurisdiction of the Federal Trade Commission.

Many in the industry disagree with the DOT conclusion and I understand that the FTC itself disagrees. This issue is too important to abide some judicial decision about the effect of existing law some 3 or 4 years from now.

In any event, if legislation is not adopted to deal with Section 411, all of the regulations adopted by the CAB in this area will terminate at sunset and it would take the FTC, even if it had the power, some months before it could adopt something new.

Meanwhile, the current anticompetitive activity in the area of computer reservation systems would continue and do significant damage to the competitive nature of the air transportation system.

I am concerned that regulatory oversight to preserve competition is quite important and necessary in air transportation. I would hope that Congress would enact legislation to preserve that regulatory oversight. I suggest that, because the Department of Transportation will have general expertise and general oversight over aviation, it is the best qualified agency to assume the responsibilities both in the field of consumer protection and in the prevention of unfair and anticompetitive practices.

That is the summary and I apologize for taking so much time, Mr. Chairman. I will be happy to answer any questions you might have.

Mr. MINETA. Thank you very much.

First, I would like to thank you for responding to our committee's invitation to testify. Your service as the Chair of the CAB during the implementation of deregulation places you in a very unique position to give the committee guidance on a wide range of issues and we really do greatly appreciate your thoughtfulness with which you prepared your comprehensive testimony.

Do I understand correctly that you continue to take the same position as you did with respect to the earlier sunset legislation, that it would be better to have antitrust immunity administered by the Department of Transportation rather than by the Department of Justice? And I was wondering if you would elaborate on the reasons for your testimony?

Mr. **Cohen**. Actually, I am afraid I was a little equivocal in my testimony on that subject.

I said that under existing law, the power to grant antitrust immunity would transfer to the Department of Justice and if that were the only issue to be addressed in legislation, I would think that the difference between transferring it to the Department of Transportation and the Department of Justice is not so significant as to justify Congress attempting to pass new legislation to change the law.

I think the Department of Justice is quite capable of administering the antitrust immunity program, just as the Department of Transportation would be, and I can see some advantages from the Department of Justice being more deeply involved in air transportation issues.

I would hope that increased personnel there and an increased focus in air transportation might assure greater attention to the preservation of a competitive air transportation system on the part of the Department of Justice.

On the other hand, the Department of Transportation, having a broad oversight over air transportation and with the power to regulate price, international price, is also a logical place to have this quasi-legislative antitrust immunity power.

While in the past I testified that this should be transfer to the Department of Transportation, my new testimony says that transfer to Justice is quite acceptable also. That is really my position at this time, Mr. Chairman.

Mr. **Mineta**. In your testimony, you indicated that you think it would be preferable to have international route decisions made by a three-member panel rather than a single career official as proposed by DOT.

I am wondering if you would explain the problem of insulation that you see in the DOT proposal?

Mr. **Cohen**. The DOT proposal does contain a number of insulation provisions, the basic Administrative Procedure Act protections. I always think back to the stories I heard at the CAB when I was there about the way some Boards were reputed to have made their carrier selection decisions before the Government in the Sunshine Act was adopted.

When the Board decided that it would not allow any staff members to sit in on the decision, the five of them, reputedly, would go into a room by themselves; the general counsel's office would have written a decision granting the authority and the only thing that was left blank in the decision was the name of the carrier that would receive the authority. After maybe a half hour or an hour, the word would come out from this room that it was United or it was American or it was Eastern.

That sort of thing stopped when the Government in the Sunshine Act was passed and when the Board started to have to make its decisions in public and the five members could not meet alone by themselves.

I found that having to make a decision in public and not being able to sit with my four colleagues and talk things over by ourselves was a good discipline. It forced me to think through my decisions when I was at the Board and to be able to sit out in public and explain the decisions that were being made. To have rational bases for decisions that I could state sitting there in public forced me to think things through much better than having a staff prepare something and merely sign it.

I think Government in the sunshine has a salutary effect on decisionmaking. When the decision is the decision of one person, no matter who that person is, then Government in the sunshine does not apply. We lose something valuable when we lose Government in the sunshine.

If one person is going to make a decision, as long as that person is identifiable and it is an on-the-record decision and reasons must be given in writing, there is some insulation there.

The fact that a Deputy Assistant Secretary, who is a career official, as decisionmaker at least tends to insulate that person since he does not depend entirely on his boss for his future.

It does not insulate completely but it tends in that direction and if one person is going to make the decision the DOT sunset plan is not bad. I would prefer that person to be a Presidential appointee confirmed by the Senate, a little higher level, and as I stated in the testimony in my paper a year ago, in a quasi autonomous modal administration, if that person were somebody comparable to the Administrator of the FAA, the decision might be made without a right of review other than the Section 801 review and it would be fully insulated from political concerns. That is still the preferable way of doing it.

My concern about the three member board is primarily the Government in the sunshine and the benefits of collegial decision making. The recommendation I made a year ago was that those three people might be, for example, the administrator of the modal administration, the deputy administrator, and the secretarial representative—that is, an assistant secretary, to assure that the policy considerations were fully taken into account.

This is a proposal that, in fact, the current chairman, Chairman McKinnon, and I arrived about a year and a half ago at lunch, when we were discussing what the best way to do this might be.

Mr. MINETA. In discussing the Computer Reservation System problem, you indicate your concern that FTC might have to go through the same 15 month process as CAB did, before FTC would take action. Along these lines, I have heard concerns that it might take FTC even longer because of Magnuson-Moss requirements. Do you think that the potential slowness of FTC procedures is another reason to give it to DOT rather than FTC, when it comes to the consumer protection responsibilities?

Mr. **Cohen**. Absolutely. I'm quite concerned right now that the absence of the CRS controls, in effect, is causing harm to competition in air transportation today, last month, and last year, the entire year. I can see the effects in the industry now. And I am concerned that it is going to be three more months even before these regulations are adopted.

I have also continuing concerns that even these regulations may not be sufficient. I think that some type of divestiture or total separation of the CRS function, within these companies, is going to be required if competition in air transportation is to be preserved.

Mr. **Mineta**. The DOT plan contemplates that DOT will have section 411 jurisdiction for international service and EAS, while FTC would have section 411 jurisdiction for non-EAS domestic services. Do you think that this split in jurisdiction would create any problems?

Mr. **Cohen**. Yes, I do. I would hope that one agency would be developing the expertise in the field of air transportation and that these powers would be, for the most part, placed in that agency.

I cannot, at this point, give you an example of where a particular problem might be develop, as between international and domestic. But I know that there is some interrelation in the computer reservation system area that one might point to. Our carriers have had CRS problems in some countries, with discrimination against them in the computer reservations systems of other governments. And that could be a factor to be considered.

I notice that it is considered in the proposed rules of the CAB, in dealing with domestic CRS. This is one place where international and domestic could be connected or interrelated and I am sure that there must be others.

Mr. **Mineta**. During your tenure at the CAB, you were firmly committed to deregulation and to sunset of CAB. The positions you have taken would result in DOT getting virtually all of the remaining authority in CAB. Some officials in DOT have suggested that transferring all of the current CAB authorities to DOT would, in effect, not be a real sunset. And I'm wondering, do you think that they have a point?

Mr. **Cohen**. I never assumed that the sunset of the CAB was some sort of punishment for bad acts; I did not understand the reason for sunsetting was because the CAB was a bad agency. My understanding was that with the termination of Federal economic control of price and entry and routes, in domestic aviation, there was really no justification for having a five member board to administer remaining functions.

My own impression, from 3 years at the CAB, and from following what they have done since, is that the continuing functions regarding international aviation, consumer protection, preservation of competition, essential air service, and the other functions, that the CAB continues to perform, are being performed well by relatively few people who are quite dedicated and who have done an outstanding job.

Since there are going to be remaining functions and they will be transferred and they have, I think, been done well in the past, I see no reason to change either the people doing them or, in general, the way they are done, just change for the sake of change. Clearly, a separate independent agency is no longer justified. A five member board is no longer justified to do these functions.

It would seem to me that one might consider, if he were taking over these functions, continuing them as they have been done in the past and then determining, after some experience, what improvements might be made. Any process, of course, is subject to some improvement.

Mr. **Mineta**. Mr. Hammerschmidt.

Mr. **Hammerschmidt**. Thank you, Mr. Chairman.

Chairman Cohen, we appreciate your being back before the committee with your knowledgeable testimony and your expertise. I only have a couple of questions.

Mr. **Cohen**. Yes, sir.

Mr. **Hammerschmidt**. You have indicated, in your testimony, that transferring antitrust authority to the Department of Justice, upon sunset of the CAB, is acceptable. As you know, most of the industry strongly supports transferring sections 412 and 414 functions to DOT. In light of DOT's expertise in air transportation issues, do you believe that having antitrust authority in DOT is desirable?

Mr. **Cohen**. Mr. Hammerschmidt, I think either is acceptable to me. I can see advantages on both sides. I imagine the transfer to DOT, would work quite well, and they could perform that function. It would be coordinated with their price regulation function in international aviation.

I am, as I said before, moderately attracted to the idea of increasing the attention of the Department of Justice to competitive issues in air transportation. They now devote, I think, some reasonable amount of attention to these issues and they submitted a very good paper to the CAB, with regard to computer reservations systems problems. Because I continue to be concerned primarily about the preservation of competition in domestic air transportation, I will be happy to see increased attention in Government to that issue.

If transfer to the Department of Justice increases that attention to the issue, I would be pleased to see it happen. In terms of intellectual consistency, with the way the air transportation issues ought to be administered in the Government, I would agree with you that transfer of this junction to the Department of Transportation is quite acceptable.

As you see, I do not have strong feelings either way. Either way is quite acceptable.

Mr. **Hammerschmidt**. I was just asking a question, not taking a position, but I appreciate your response.

Speaking further on the competitive environment out there, as you know, some airlines are concerned about the prospects that the larger carriers will abruptly terminate interline agreements with other carriers, as a competitive response to the actions of these carriers. For example, American Airlines recently announced that it was terminating its interline agreement with Continental because it was upset at Continental's promotion which encouraged passengers to trade their coach tickets, purchased on other airlines, for a first class seat on Continental.

Does American's recent action trouble you, and do you think that the potential exists for existing interline agreements to be repudiated on a wider basis and further, do you believe that there were other legitimate ways for American to respond to the Continental promotion, other than in the manner it did?

Mr. **Cohen**. My answer is yes to everything you have asked. This whole area of selective refusals to interline troubles me quite a lot. I am also aware of one small carrier which has been trying to enter interline agreements with some major carriers and has been refused. These major carriers interline with each other but they have, by refusing to interline, put the small newer carrier at a real competitive disadvantage. And it's tactics of this nature that rather concern me about trying to preserve competition in the future in this industry.

Clearly, if an airline does not want to be an interlining airline, I think it should be free to function without interlining. People's Express and Southwest, their basic way of operating is not to interline. But most carriers do choose to interline. When a few carriers choose to interline with each other and then all of them decide that they're not going to interline with a newcomer, that puts the newcomer—who wants to get into this interrelated network of transportation—at a serious disadvantage and can do harm to competitive entry and the future of competition in the industry.

I understand that there is a financial problem involved when you interline. You are selling the other carrier's tickets. And if you go bankrupt at a time when you have a lot of the other carrier's money in your possession, there are some legitimate concerns. Those concerns were stated to be the reason, I think, that American went to this 30-day plan.

That problem, however, can be discretely addressed, with requirement for a bond, or a provision for some type of protection that deals with that problem without using the problem as an excuse to refuse to interline with potential competitors while continuing to interline with others.

Mr. **Hammerschmidt**. Does section 411 give the Federal Government adequate authority to reach this kind of problem?

Mr. **Cohen**. I think it does. I think it does in the context of this being used as an anticompetitive practice. I'm not suggesting, at this point at least, that Congress adopt a law requiring interline. Some carriers will choose not to be interline carriers at all. It may be that legislation should require that if a carrier chooses to interline, it interline with all applicants, with some provision for addressing this financial problem. That might be appropriate.

I would hope that section 411 and its protection against anticompetitive practices is broad enough to address this problem without additional legislation. But additional legislation may be helpful in the future, when the CAB has addressed this issue and determined whether section 411 is broad enough.

I would hope that it is broad enough. It is up to the CAB lawyers to decide.

Mr. **Hammerschmidt**. Thank you very much. Thank you, Mr. Chairman.

Mr. **Mineta**. Mr. Chairman, again, thank you very much for your testimony in helping enlighten our subcommittee.

Mr. **Cohen**. Thank you, Mr. Chairman, and Mr. Hammerschmidt.

Our next witness is Mr. Knut Hammarskjold, director general, International Air Transport Association.

Mr. Hammarskjold, the full text of your prepared statement will appear in the record at this point.

[Statement referred to follows:]

TESTIMONY OF
KNUT HAMMARSKJOLD
DIRECTOR GENERAL OF THE
INTERNATIONAL AIR TRANSPORT ASSOCIATION

before the
SUBCOMMITTEE ON AVIATION
HOUSE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

March 13, 1984

Knut Hammarskjold
Director General
International Air Transport
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My name is Knut Hammarskjold. I am Director General of the International Air Transport Association (IATA). IATA is a cooperative democratic association of 127 of the world's airlines. Our members include large and small carriers from all corners of the globe flying the flags of many individual nations, both developed and developing, covering a wide spectrum of political, social and economic philosophies.

IATA's objective is to promote safe, regular, and economical international air transport for the benefit of the public and to provide a means for airlines to cooperate to this end. Over the years, the member airlines of IATA have built an integrated, global air transport system which provides a vital link between users, airlines and governments. This is accomplished through a multitude of activities. For example, complex interline facilities have been established which permit travelers to buy one ticket in one currency at one time for any number of connecting flights on different airlines. IATA also establishes standards and procedures for the appointment of travel agents and their relations with airlines, thus saving the costs of each airline doing this individually and giving travelers the assurance of dealing with qualified travel professionals. As one integral part of these activities, IATA provides member airlines a multilateral forum in which their individual tariff proposals are coordinated for presentation to governments .

I welcome the opportunity to testify before you today on questions concerning CAB sunset. The Chairman of the Subcommittee, Mr. Mineta, said in a recent speech that there should be a sunset bill. We in IATA agree. We also agree with the Chairman that the remaining provisions of the Federal Aviation Act (FAA) should be transferred to a single agency, not dispersed here and there.

I hope that my testimony will shed additional light on why we believe this is a correct position. My perspective is, of course, that of IATA and its airline members. I also believe I can bring to this committee a perspective based on many years of personal experience in observing and participating in the arena of international relations among airlines and among governments, both in aviation and in other fields.

I note this perspective because, unlike the 45 or so years the CAB and its predecessors were in existence, the main attention and principal resources of U.S. authorities in aviation regulation, upon sunset, will be focused on international air transport. Regulation in the international area will continue unabated, not perhaps because the U.S. wants it that way, but because that is international reality.

Consideration of a CAB sunset bill gives the Congress the opportunity not only to make some seemingly procedural changes in the deregulation act but also to halt what we perceive to be a dangerous trend in regulatory process and to make the U.S. more effective in the implementation of international air transport policy. My testimony will be directed to these two main themes.

Judicial Regulation

The dangerous trend in regulatory process is what I will call, for lack of a better term, judicial regulation. By this I mean that, instead of having an administrative agency regulate cooperative behavior among airlines, the responsibility is relegated to the judicial system which will eventually establish the parameters of acceptable cooperative behavior through the process of litigation and development of case law. I can perhaps best describe these dangers by addressing three examples .

The first example is the so-called show cause order (SCO). While IATA's tariff coordination activities had been questioned in the past, most observers accepted that tariff coordination was better than realistically available alternatives, and that it provided an essential underpinning for the industry's efforts to develop joint programs, standard procedures, and interline products for the benefit of the traveling and shipping public. For almost 40 years, these cooperative endeavors, as well as IATA tariff coordination, enjoyed the approval of governments throughout the world. In the United States, the CAB had approved the basic IATA coordinating machinery and granted it immunity from the U.S. antitrust laws. The CAB has also reviewed all specific agreements reached through this machinery and, until recently, approved and immunized those found to be in the public interest.

This fabric of international acceptability was challenged when the CAB issued the SCO in 1978 threatening to withdraw approval and immunity from the entire IATA process. Forty-eight governments individually and sixty-five through international organizations registered formal protests against the SCO. As you know, in the face of this united and hostile foreign reaction, and responsive to concerns expressed by the Administration and by the Congress itself, the CAB narrowed considerably the scope of its investigation. However, although the CAB ultimately decided to continue approval for IATA tariff coordination, it granted the approval for only two years (since extended to three years) and it specifically disapproved U.S. carrier participation in U.S.-Europe meetings. This decision has been stayed by the CAB because of the obligations incurred in the U.S-ECAC Memorandum of Understanding on North Atlantic Pricing (the MOU), but the ultimate outcome remains in doubt due to uncertainties over the MOU.

We believe it is unreasonable for a threat such as the SCO to continue to hang over the head of the international aviation community when:

(1) IATA has accommodated to new views on competition by adopting procedures for innovative tariff filings, government observers, presentations by consumer groups, and greater flexibility and transparency;

(2) Both the Departments of State and Transportation are on record urging that the CAB terminate the SCO;

(3) The President himself intervened at one point, for foreign policy reasons, to stop a precipitious CAB action to implement its final order; 1/

(4) Even the Justice Department has acknowledged that it is not IATA which stands in the way of a more competitive international system, but the divergent policies of governments; 2/

(5) The U.S. and European governments have sanctioned the IATA process in the MOU, which incidentally we strongly endorse;

(6) In the other transportation area of shipping, conferences enjoy mandated immunity under U.S. law;

(7) More than a hundred governments, through the International Civil Aviation Organization, a specialized agency of the United

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1/ Letter dated August 20, 1981 from the President to Chairman of the CAB.

2/ Letter dated May 5, 1982 from Assistant Attorney General William F. Baxter to Ralph Nader.

Nations, adopted in 1977, 1980, and as recently as last year, several resolutions reiterating their support for the IATA multilateral tariff coordinating machinery and urging all states members of the Organization to refrain from disruptive unilateral action; and

(8) The Congress itself has questioned the wisdom of the proposed CAB actions. 3/

The SCO was essentially a statement by the CAB that it would no longer sanction the IATA process, and that instead IATA and its members could take their chances in the courts, that is, in judicial regulation. We suggest it is time to bring the show-cause era to an end by terminating the SCO proceeding, and we encourage this committee to express such a view. The U.S. retains ample means to safeguard against unacceptable behavior by reviewing agreements reached in IATA conferences under the Section 412 standards, without relying on the outmoded and tarnished vehicle of the SCO or other forms of judicial regulation.

My second example is the Competitive Marketing Investigation instituted by the CAB to examine the airline industry's distribution systems. It announced its decision in December 1982. These

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3/ "Levitas amendment" to Department of Transportation appropriations bill for FY1982; Report of the Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation (House) on the Improvement Needed in the Implementation of U.S. International Aviation Policy, August 1983.

hearings do not concern the details of that decision. It is important for this Committee to understand, however, the full implications of that decision in relation to CAB sunset issues.

Stripped of details, the CAB said that, instead of determining whether specific aspects of agency agreements meet the public interest standards of Section 412 of the Act, it would approve the agreements but withhold antitrust immunity. This is the epitome of judicial regulation. It is also the central problem with the CAB's final decision in the CMI.

The IATA agency programs cannot survive without antitrust immunity. I know you have heard in other hearings from CAB, DOJ, OMB and DOT witnsses that this assertion is without foundation, that other industries survive and prosper without antitrust immunity, and that there is no reason why IATA and ATC cannot accommodate to a no-immunity environment. They are just plain wrong. International air transport is not just like other industries. For one thing, it seeks in many situations to sell joint products. And, I believe uniquely, its very existence is dependent upon agreements among numerous sets of bilateral sovereign partners. The 20,000 IATA travel agents in the U.S. sell air transportation not only for the seven U.S. airline members of IATA, but also for the more than 100 foreign airline members. What are these members to do in the face of the CAB decision? The proponents of the CAB decision make it appear that, because the CAB approved most parts of the agency programs and found that they basically served a public need, no one should have anything to worry about. What the CAB really said, however, was that some approved features of the program were on shaky grounds, and the CAB would leave it to the industry to make changes, or -- and this is the important part -- face antitrust suits.

Let me dispell one other myth, namely, that opposition to the CAB decision really comes from the agents who want to preserve their way of life. I can assure you that the IATA member airlines like the agency program and want to keep it. More than that, they need it to retain an essential marketing tool at less cost than any alternative. If any U.S. Government official is in any doubt, I invite him or her to observe IATA's upcoming passenger agency conference to hear what our member airlines believe on this point.

The IATA member airlines have operated the U.S. agency program for many years in the knowledge that they will not be hauled into U.S. courts for antitrust violations so long as they adhere to the CAB-approved and immunized agreements. Realistically, the 100 or so non-U.S. airline members of IATA expect that, when the U.S. Government approves these agreements, they will not then be subject to a double test in U.S. courts.

Their only choice, if immunity is now withheld, would be to alter the agency programs so that there would be the same degree of risk as there is now. Our counsel advises this would require that each airline member individually establish standards for the appointment and retention of agents. This would defeat the raison d'etre of the program, which is to avoid the costs of individually established and administered standards. In short, maintaining the existing programs will lead to antitrust suits, with wasteful costs, time-consuming delays, and high risks of uncertainty, 4/ which will ultimately wreck the programs. The alternative of altering the programs to maintain a zero antitrust risk will also lead to abandonment.. This inevitable process is bound to lead to international frictions, as other governments charge the U.S. with violating the "fair and equal opportunity" provisions of bilateral agreements.

My third example of judicial regulation concerns the intention of DOJ, with apparent DOT approval, to apply the no-immunity approach to all non-pricing agreements among airlines, whether the subject matter is the agency program, interline agreements, standard ticketing and reservations procedures, airport scheduling

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4/ In this connection, the DOJ itself stated in a submission of February 12, 1979 on the SCO that "antitrust immunity to collectively set fares should not be conferred merely because of states' fears that carriers will be subject to frivolous law suits. It is clearly less costly to the public to have included in the cost of service the legal fees necessary to win motions to dismiss frivolous law suits, than it is to pay fares year in and year out which are artificially inflated due to price fixing." This, of course, blithely disregards the damages which the U.S. would suffer in its international relations and the complicated disputes in which it would be involved if judicial regulation were to be adopted as standard practice.

committees, or anything else. DOJ would apparently even apply this approach to non-pricing arrangements outside the U.S. which might still be subject to the reach of the U.S. antitrust laws. It is true that some cooperative agreements among airlines of a technical nature may not raise competition issues and can survive without antitrust immunity. However, a wholesale approach of approving agreements and then denying them immunity will only create the same kind of problems for many other programs as in the agency field. Programs which are accepted as worthwhile will be abandoned. And foreign sovereigns will not accept the fact that, by withholding immunity for non-U.S. programs, they can be challenged in U.S. courts.

Effective Implementation of U.S. Policy

You have seen that we believe judicial regulation will wreck worthwhile IATA programs and lead to international frictions. But the danger does not stop there. Once the CAB and/or executive branch has in effect delegated to the judiciary branch the task of regulating intercarrier behavior involving the U.S. and foreign airlines -- whether with respect to tariff coordination, agency programs or other types of cooperative agreements -- there will be no way to resolve the resulting intergovernmental disputes. It is sometimes difficult to resolve international aviation disputes even when administrative agencies control the subject matter of the dispute. The

U.S.-ECAC MOU is a good example. But there is not even a process available for international reconciliation when the courts are in charge. I wonder how U.S. government negotiating officials would respond if told by a foreign government that it can do nothing about a discriminatory or unfair competitive practice dispute because the courts of that country are in charge. And yet this is exactly what the CAB originally proposed in the SCO and what it has tried to do in its CMI decision. It is also what the DOT and DOJ say will be done with all non-pricing forms of industry cooperative programs when the CAB sunsets.

Viewed from a United States perspective, I also suggest to you that judicial regulation will weaken, not strengthen, the ability of the U.S. to be effective in implementing the goals and objectives of U.S. international air transport policy. In fact, I can accurately say that other governments would prefer that major aviation countries, such as the U.S., have effective mechanisms for implementing their policies because this avoids confusion and indecision and adds to certainty. The U.S. will not have the flexibility to deal with, or to bargain for, international matters involving cooperative agreements if regulation of the subject matter is in the hands of the judiciary.

I might add that the U.S. will also be more effective in achieving its policy goals and objectives if all the international regulatory functions, particularly Sections 412 and 414 of the Act, are all under one roof. Up to now, the fact that the executive branch negotiates agreements which the CAB implements has sometimes created confusion and led to ineffective implementation of policy. As a result, the U.S. Government has not always dealt with international problems as effectively as a major player should and this has hurt the international system as a whole. Now that the executive branch will both negotiate and implement, these deficiencies will disappear if, that is, the job is not again split up among different agencies.

From an institutional perspective, we believe that the 412/414 functions should be transferred to DOT, not DOJ. The DOJ is basically and historically against industry cooperative programs. The record is replete with instances of its opposition to cooperative proposals, many of which the CAB nevertheless approved. The position of DOJ on airline tariff agreements and IATA tariff coordination activities has been unchanged for many years and widely publicized in a series of submissions and testimony. Both before the Congress and before the CAB from 1979 to as recently as July 1983, DOJ stated, inter alia, that "... given that neither passengers nor carriers need uniform fares to interline, there is simply no legitimate commercial rationale for multilateral fare coordination"; 5/ "... IATA rate-setting today is anticompetitive and has caused rates to be set at artificially high levels"; 6/ "... our strong foreign policy interests lie in the establishment of free markets in international air transportation. Abolition of IATA fixing of rates and regulation of their components is an important step in that direction". 7/ While this is evidence enough, DOJ is perceived abroad as being a doctrinaire agency which follows the dangerous path of applying purely domestic theories to the international marketplace without regard to the interests of the international community, including those of the United States itself.

Conclusion

My testimony points to certain conclusions regarding the questions before this committee.

The first and foremost is that there should be sunset legislation which includes the transfer of Sections 412 and 414 of the Act to the Department of Transportation. In fact, we

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5/ Docket 32851, DOJ submission dated November 5, 1979, Page 21.

6/ Docket 32851, DOJ submission dated February 12, 1979, Page 4.

7/ Docket 32851, DOJ submission dated January 19, 1979, Page 39.

believe that all international functions should be in one agency, namely, the DOT.

While this will go a long way to avoid or ameliorate the problems I have referred to concerning judicial regulation and effective implementation of U.S. policy, it will not necessarily be sufficient. I therefore also urge this committee to consider other steps to signal its disenchantment with the growing trend toward judicial regulation of international air transport and to its desire to improve the effectiveness of U.S. policy implementation.

As indicated, the committee could call for an end to the show-cause era by proposing that the SCO be terminated.

The committee also could endorse the Air Travelers Security Act to ensure that the IATA agency program is not regulated by the judiciary.

A more firm signal regarding judicial regulation would be to amend Section 414 of the Act to provide that immunity must be given to all competition-sensitive international agreements approved under Section 412.

Thank you.

Mr. MINETA. Please proceed.

TESTIMONY OF KNUT HAMMARSKJOLD, DIRECTOR GENERAL, INTERNATIONAL AIR TRANSPORT ASSOCIATION; ACCOMPANIED BY GEOFFREY LIPMAN, EXECUTIVE DIRECTOR; MICHAEL STYLES, REGIONAL DIRECTOR; AND BERT REIN, WASHINGTON COUNSEL

Mr. HAMMARKSJOLD. Thank you, Mr. Chairman.

I am accompanied by Geoffrey Lipman, executive director; Mike Styles, our regional director; and Bert Rein, Washington counsel.

We welcome this opportunity to testify before you this afternoon on questions regarding the CAB sunset.

Mr. Chairman, you have said in a recent speech that there should be a sunset bill. We entirely agree. We also agree with you that the remaining provisions of the Federal Aviation Act should be transferred to one single agency.

I hope that my testimony will shed additional light on why we believe this is a correct position. My perspective is that of IATA and the 127 airline members throughout the world. I also believe I can bring to this committee a perspective based on many years of personal experience with international relations among airlines and among governments. I have always seen it as a challenge trying to contribute to the bridging of potential international political and other conflicts between governments and airlines, to promote negotiated solutions, and to prevent nonproductive, frustrating, head-on collisions. It is therefore also a personal satisfaction for me to have this opportunity to discuss with you matters with very important international implications.

I want to stress that my testimony does not deal with the U.S. domestic marketplace. I note this international importance because, unlike the 45 or so years the CAB and its predecessors were in existence, the main attention and principal resources of U.S. authorities, upon sunset, will be focused on international air transport, not because the U.S. wants it this way, but because that is international reality in a world of sovereign states.

Consideration of a CAB sunset bill gives the Congress the opportunity, first, to halt what we perceive to be a dangerous trend in regulating international markets, and second, to make the United States more effective in the implementation of international air transport policy. My testimony is directed to those two main themes.

The dangerous trend in regulatory process is what I would call, for lack of a better term, judicial regulation of international aviation. By this, I mean that instead of having an adminstrative agency regulate cooperative behavior among airlines, the responsibility is delegated to the judicial system which will eventually establish the parameters of acceptable cooperative behavior through the process of litigation and development of case law.

And if I may, Mr. Chairman, I would like to send for the record an article which I have written on this subject in the McGill University Annals of Air and Space Law.

[Article referred to follows:]

ANNALS
OF
AIR AND SPACE LAW

McGill

ANNALES
DE DROIT AÉRIEN
ET SPATIAL

Vol. VIII – 1983

The ANNALS OF AIR AND SPACE LAW is published by the Centre for Research and the Institute of Air and Space Law, McGill University. It gathers under the same cover articles of worldwide prominent scholars, practitioners and other specialists in air and space law. It not only deals with legal topics of current interest but also with those problems of growing concern in the realm of emerging air and space activities. Their multiple implications are also considered: technical, socio-economic, or political, as well as their repercussions on international organizations.

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The Editor-in-Chief and founder of the ANNALS is Nicolas Mateesco Matte, Director of the Institute of Air and Space Law and Centre for Research. He is assisted by an Editorial Board, the members of which are: Professors Ivan A. Vlasic; Martin A. Bradley; Peter P. C. Haanappel; Dr. Jean-Louis Magdelénat of McGill University; Professor Jean Pineau of the Université de Montréal; Professor Paris Arnopoulos of Concordia University and Professor Mircea Mateesco-Matte of the Université de Nantes and the Institut d'étude des relations internationales de Paris; Mr. Ian E. McPherson, Vice-President (Legal) Air Canada; Dr. Michael Milde, Principal Legal Officer, I.C.A.O., and Mrs. Huguette Larose-Aubry, Senior Counsel, I.A.T.A.. In addition there is a group of external readers which includes Mr. L. Haeck (I.A.T.A.), Professors T. Pavlasek and A. Vicas (McGill University).

Les ANNALES DE DROIT AÉRIEN ET SPATIAL sont publiées par le Centre de Recherche et l'Institut de Droit Aérien et Spatial, McGill University. Elles rassemblent sous une même couverture, des articles d'éminents universitaires, praticiens du monde entier et autres spécialistes en droit aérien et spatial. Elles traitent non seulement des problèmes d'intérêt juridique actuel mais aussi de ceux qui se développent à la lumière des nouvelles activités aéronautiques et spatiales. Ces dernières sont aussi analysées dans leurs multiples implications techniques, socio-économiques ou politiques, ainsi que leurs répercussions au sein des organisations internationales.

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Le rédacteur en chef et fondateur des ANNALES est Nicolas Mateesco Matte, Directeur de l'Institut de Droit Aérien et Spatial et du Centre de Recherche. Il est assisté d'un comité de rédaction dont les membres sont: les professeurs Ivan A. Vlasic; Martin A. Bradley; Peter P. C. Haanappel; le Dr Jean-Louis Magdelénat de l'Université McGill; le professeur Jean Pineau de l'Université de Montréal; le professeur Paris Arnopoulos de l'Université Concordia et le professeur Mircea Mateesco-Matte de l'Université de Nantes et de l'Institut d'étude des relations internationales de Paris; M. Ian E. McPherson, Vice-président (affaires juridiques) Air Canada; le Dr Michael Milde, Sous-directeur, Direction des Affaires juridiques, O.A.C.I., et Mme Huguette Larose-Aubry, Conseiller juridique, I.A.T.A.. De plus un groupe de lecteurs externes comprend Me L. Haeck (I.A.T.A.), les professeurs T. Pavlasek et A. Vicas (McGill University).

ABOUT THE NEED TO BRIDGE A JURISDICTIONAL CHASM

by

Knut Hammarskjöld

> *"Maintaining international competition is the proper business of diplomats and negotiation, not federal judges and litigation"*
> (Washington Post Editorial, November 4, 1979).

Preamble

This paper deals more with the principle of law than it does with law itself. That is because the solution to an area of growing difference between nations, which touches on legal and economic issues, does not necessarily lie within the rigid juridical forum but in the statesmanship and diplomacy of inter-governmental agreement.

Regrettably, there exists an absence of satisfactory, internationally-agreed rules and procedures for the avoidance of conflict and collision between national legislations when they are applied unilaterally outside the national territory. The focus here is where this impacts on international air transportation, not necessarily the target of the dispute so much as one caught inevitably in the crossfire due to the unique nature of its integration worldwide.
This paper therefore:

- addresses the problems created by these jurisdictional collisions in the context of the international air transport system;
- explores the growing trend towards and reasons for the application of national policies and legal concepts beyond national boundaries;
- identifies resultant blocking legislation introduced by other states, leading to polarization; and
- examines the need for a code of conduct or procedure for both reversing the trend and establishing the necessary mechanism for avoiding international conflict.

Background

There is no limit to the imagination and inventiveness of mankind. In one generation, we have mastered three dimensions of physically transporting men and goods by air: continental, intercontinental and in space. Even the bounds of our own solar system were recently exceeded: and some 10,000 years from now, if they are allowed to be born, our descendants may witness the creation of an intergalactic transportation system as forecast half a century ago by the Swedish sailor-poet Harry Martinson in his epic poem 'Aniara'.

This cosmic perspective on man's striving for a better world may add a sobering relativity to what we have achieved, or failed to achieve, so far. At least in air transportation, we have welded the diverse interests of many national states and dependencies into one cohesive system. And in so doing, we have achieved in part the 'One World' dream born of the chaos of World War Two.

The achievement of a globally-integrated air transportation network is the result of 40 years or more of technological progress, paralleled by a massive effort aimed at worldwide standardization of all areas operational, economic, commercial, and financial. The common objective has been to make air transportation in the 'One World' as easy and convenient as within one country. Once achieved, however, the situation is not static but one which is highly dynamic and requiring continuous effort.

Responsibility for this is essentially centered upon the International Civil Aviation Organization (ICAO), a specialized agency of the United Nations; and, on the industry side, upon the International Air Transport Association (IATA), which provides the framework for coordination and cooperation between 120 or so airlines worldwide in both their own and the public interest, along with the very infrastructure of the airline industry itself.

It has been under the aegis of the ICAO Legal Committee that international aviation lawyers have performed outstanding service in formulating all major recent conventions. The continuous evolution and development of the international air transportation system requires even fuller appreciation and utilization of their potential for identifying and resolving problems; indeed, the avoidance of underutilization of their special talent for constant adaptation of legal requirements to technological and institutional change.

Expanding complications in the legal field have one thing in common. They either serve the vested interest of a particular group or country, or the ideological purpose of a specific school of economic thought. In no case do they serve the common interest of the worldwide air transportation system. Nor do they serve the interest of the consumer, the travelling public and the shipper. On the contrary, they make their lives potentially more cumbersone, uncertain and expensive.

Such phenomena are further evidence of the imperfections of the international legal system. The challenge facing international aviation lawyers, in representing their governments, is to improve this system to the point where it will assist, rather than impede, technological fulfillment of the 'One World' objective.

The Nature of the Challenge

The problem is not just one for lawyers and the law, although they form an essential part of the chain. A Washington Post editorial of November 4, 1979, entitled 'Anti-trust: The New Imperialism', declared that "maintaining international competition is the proper business of diplomats and negotiation, not federal judges and litigation".

The collision course of national legislations governing competition represents a potential threat to the high level of standardization and harmony in global air transport already achieved. And judging from developments of the last few years, we are facing a race against the clock. The problem is increasingly acute in the United States and the European Common Market. It is spreading to Australia, Canada and beyond.

Growing, too, are the different countermeasures; from the United Kingdom, France, the Federal Republic of Germany and elsewhere. As the issue becomes emotional as well as political, there is the threat of escalation on all sides — the present US-UK conflict triggered by the civil and criminal 'Laker Cases' being a clear illustration. (1)

Who suffers? Ultimately, we believe, the public. Because the effectiveness of international air transport — a public service industry — is constantly impaired by this Damoclean threat.

The problem is not new. The growth of independent nation states over the past three centuries has been reflected in economic system changes. Where markets could be homogeneous (within national boundaries) and subject to a standard legal regime, economic efficiency increased. Irresistibly, these same forces led either to territorial expansion or to recognition of foreign sovereignty followed by agreed common trading principles. As the principle became more widespread, so economic integration grew, again accompanied by political interdependence.

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(1) A British appeals court ruled July 26, 1983 that the liquidator of Laker Airways cannot pursue his civil anti-trust suit in the U.S. against British Airways and British Caledonia Airways (The *Wall Street Journal* of July 27, 1983).

In the course of this process, enormously complex legal differences were able to be resolved. At the same time, international trade remained sensitive to the compromise between recognition of foreign sovereign boundaries and the wish to apply national policy or legal controls.

There is a danger that we overlook the compromises which were necessary in developing our present international trading system. Similarly, as domestic policy ambitions become more numerous and divergent, the tension between international economic forces also grows. In that sense, increased interdependence implies loss of autonomy in national economic policy.

Nevertheless, the increase in potential gain from policy coordination with other countries more than outweighs this disadvantage. And this is dictated by logic rather than luxury. For though we may be motivated by higher ideals, the enduring force for cooperation is still mutual advantage.

Given that we cannot ignore the implications of sovereign boundaries for improved international trade — particularly with regard to aviation, which is based on the notion of national sovereignty — our objective, realistically, must be agreement to limit the areas of conflict.

Said a US spokesman recently: "In this modern age of nationalism, every nation is extraordinarily sensitive to other countries' assertions of jurisdiction that seem to impinge on the sacred domain of national sovereignty. The irony is that the modern world also generates its own, almost unavoidable conditions of jurisdictional conflict. We live in a world of increasing economic interdependence. The rapidly-growing scale of international trade and investment in the postwar period has brought with it a vast expansion of law, regulation and legal complexity. The result is that even among the closest allies, claims of jurisdiction are bound frequently to collide." (2)

Extraterritorial Jurisdictional Claims

The problem of conflicts of jurisdiction internationally goes back to ancient times. Under Roman law, a citizen was subject to Roman jurisdiction wherever he travelled. Latterly, extraterritorial controls have most commonly been exercised in pursuance of foreign policy or national security goals. (3) Nor is the problem today limited to anti-trust or competition rules. It is just that they tend to be very controversial and therefore the most visible. They have served, too, as a means of exporting economic policy.

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(2) "Extraterritoriality, Conflicts of Jurisdiction, and United States Foreign Policy" — an address by Deputy Secretary of State Kenneth Dam, delivered to the American Society of International Law, Washington, D.C., April 15, 1983.

Of longest standing and most widely known are the anti-trust laws of the United States — the Sherman-Clayton Acts. (4) The Sherman Act of 1890 established far-reaching implications in its very first section when it ruled unlawful "every contract, combination . . . or conspiracy, in restraint of trade or commerce within the United States *or with foreign nations.*" Thus, an undefined and potentially vast area of international trade was made subject to anti-trust attack.

The Act is short and couched in general terms. It is ironic, in view of its international economic importance today, that it was only briefly discussed by Congress in the spring of 1890; and equally, that its origins lay in the vague populist concerns of the late 19th century. It represented a response to popular attacks on combines and trusts and Senator Sherman, in support of his bill, stated the need to placate public feelings with the words: "the popular mind is agitated with problems that may disturb the social order."

Rather similar, though less dramatic, populist concerns have motivated modern US policy makers to apply these same laws to international aviation, even though the world has undergone massive change in the meantime. However, there is a need for a code to govern their applicability since they are open to highly-subjective interpretation and can be used *de facto* as a means of monitoring or controlling marketplace competition according to the prevailing policy at any given time.

Unless express legislative authority, as vested in a regulatory body to grant immunity,(5) is applied, no cooperative commercial venture may be taken without the threat of private or criminal action. (6)

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(3) The US Export Administration Act of 1979 authorizes control over goods or technology "subject to the jurisdiction of the US or exported by any person subject to the jurisdiction of the US where this is necessary to further the US' national security or foreign policy objectives".

(4) The Sherman Act provides the foundation for both criminal and private suits. As a felony, violation of the Act may be punished by prison terms of up to three years, corporate fines of up to $1 million and, in addition, corporate official fines of up to $100,000. Any natural or legal person claiming injury to its business or property may seek compensation of up to three times proven damages (so called 'treble damages' actions) plus legal fees; furthermore, a claimant may sue on behalf of a 'class' of similar potential claimants, greatly multiplying the treble damages.

Applying such domestic guidelines internationally can provide some interesting contrasts and suggests the need for caution in extrapolating basic principles beyond national boundaries.

For instance, approximately 250 million passengers flew on US domestic scheduled services last year whereas only 15 million passengers flew between the US and Europe during the same period. Thus 25% of the domestic market, which represents a figure more than four times greater than the entire US-Europe market, can be protected by a domestic US carrier without anti-trust intervention. An added perspective is given to that situation if the same US carrier is one of the operators on the North Atlantic.

Of course, other countries have competition or anti-trust legislation, and though objectives vary, the main purpose is essentially to prevent monopolization and abuse of market dominance. (7)

In the aftermath of World War Two and the establishment of new international trading philosophies, US anti-trust law concepts influenced and often permeated new national bodies of law. For example, under the conceptual dominance of US law, the Western Occupation Powers in Germany established the legislative base for competition laws in that country. It is worth noting, however, that German anti-trust law, presumably as a matter of policy, has not to date extended into a tool for international trade control — despite the fact the law has grown very much in step with its US counterpart. (8)

By contrast, the main objective of European Community competition policy is to create an internally competitive yet unified market within the general guidelines of the Treaty of Rome 1957. (9)

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(5) Such as that possessed by the Civil Aeronautics Board under Sections 412/414 of the Federal Aviation Act.

(6) Professor Laurence White, Chief Economist of the DOJ Anti-trust Division, reported in *European Law Letter*, March 1983 at page 7 that "the Department of Justice would generally not intervene in market protection cases where the distributor whose actions are being examined holds less that 25% of the market."

(7) The UK has the Restrictive Trade Practices Act 1976 and the Competition Act 1980; Canada has the Combines Investigation Act 1970; Japan has an Act concerning the Prohibition of Private Monopoly and Maintenance of Fair Trade; French competition law is based on a Decree of June 30, 1945 and a law of July 19, 1977; Australia has the Restrictive Trade Practices Act 1974; Korea has The Anti-Monopoly and Fair Trade Act 1980; and Israel has the Consumer Protection Law 1981; et al.

(8) The controlling legislation is now the Act Against Infringements of Competition, 1974.

Articles 85 to 94 of the Treaty create a regime which nevertheless contains many of the characteristics of the American system. (10) More importantly in the present context, the Competition Directorate of the EEC Commission — which is responsible for implementation of the Treaty — has made clear its intention to take a legalistic approach to *per se* violations and to concentrate on larger enterprises.

Additionally, Article 85 provides for an 'effects' test which could have a comparable impact outside the Communities to that of the US 'effects' doctrine (11) in instances where prohibited practices have an effect on "competition within the Common Market". In view of the determined attitude shown by the Commission, reflected in public statements, it may only be a matter of time before extraterritorial claims of jurisdiction are made on these grounds.

The Role of Comity

Comity, a form of recognition between nations of each other's laws and usages, has many interpretations. (12) It is at the conceptual crossroads of international jurisdictional conflicts and, as such, must retain a certain ambiguity.

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(9) These include: "the institution of a system ensuring that competition in the Common Market is not distorted" and "the application of procedures by which the economic policies of Member States can be coordinated and disequilibria in their balance of payments remedied." (Article 3, paragraphs 'f' and 'g').

(10) Paragraph 1 of Article 85 provides: "The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

(11) In a 1945 case *(United States v. Aluminum Company of America,* 148 F.2d 416 2d Cir. 1945) the reach of US anti-trust laws was extended further to actions having an "effect on commerce" in the US. The Courts have since acted against worldwide agreements between non-US persons which specifically did not include the US market. The basis for this jurisdictional claim was that competitive limits in non-US markets affect import and export opportunities in the US and therefore had an effect on US commerce. The doctrine has been heavily criticized internationally and by some US Courts *(Timberlane Co. v. Bank of America,* 549 F. 2d 597 9th Cir. 1976) but nonetheless remains.

For the US, the demarcation line for anti-trust enforcement has been drawn as follows: "considerations of jurisdiction, enforcement policy, comity, often but not always lead to the same conclusion; namely, that the US anti-trust laws should be applied to overseas transactions where there is a substantial and foreseeable effect on United States commerce; and, consistent with these ends, it should avoid *unnecessary interference* with the sovereign interests of foreign nations." (13)

At all times, application of the concept (and eventually the concept itself) must be tempered by reality. If a country is clearly physically incapable of exacting judgment it will be reluctant to assert claims. By the same token, there will be a tendency on the part of a powerful country to apply its laws extraterritorially. And this discrepancy of action again underlines the need for a code of behavior which is observed by all parties, powerful or otherwise.

For the US, the question is often one of restraint rather than ability to enforce. As a vital part of the free world trading system, the US attracts foreign companies, together with their personnel and physical assets. It also generates companies whose activities spread throughout the world. Consequently, the US is able to play an important part in developing new trading principles and amending old ones. Interrelated with this is the power to exercise direct punitive control against corporate officials and assets.

On occasion, the commercial and diplomatic stakes become so high as to outreach domestic law — as happened recently in the US-Europe pipeline confrontation. But is is important to be guided by a genuine restraint and not one that comes from fear of retaliation or impotence; rather, one stemming from recognition that worthwhile compromise and policy harmonization result in long term general benefits.

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(12) *Black's Law Dictionary* (5th Edition) defines Comity of Nations as meaning "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws." The same source defines 'judicial comity' as "the principle in accordance with which the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect."

(13) *The Anti-Trust Guide for International Operations* drafted and presented by the Anti-Trust Division of the Department of Justice in January 1977.

Blocking Legislation

One response to the failure of general legal principles to settle extraterritorial disputes has been the passage of so-called 'blocking legislation'; in other words, legislation designed to protect the citizens of one country from the exercise of jurisdiction by another. It is, of course, no mere coincidence that major trading nations should take strong opposing positions. Where actions are 'at arm's length', compromise or conflict is inevitable. Where the more powerful meets the weaker, the alternatives become suppression or restraint.

The UK's Protection of Trading Interests Act 1980 was an extension of an earlier, similarly-directed Act. It created an executive power to prohibit compliance with substantive requirements of foreign law in all cases where British interests were threatened. The earlier Act had been limited to shipping.

Importantly, the new Act also automatically made all multiple damage judgments unenforceable against UK companies, a direct response to the Sherman Act treble damage provisions. The most novel provision of the new Act further gave UK companies a right to recover any penal element in certain multiple damage actions from the beneficiary company where that company was within UK jurisdiction.

The UK Act has served as a defense mechanism against extension of US jurisdiction in commercial matters. However, at the time the Act was brought forward, the UK Government responded to expression of US concern at its contents by stressing "the belief that differences between nations over legal and economic issues should be explored and where possible resolved by inter-governmental discussion and agreement" (14), that is to say, by diplomatic means. The UK, of course, is not alone in possessing blocking legislation. (15)

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(14) UK response to US diplomatic note concerning the UK Protection of trading Interests Bill, November 9, 1979 which quoted the UK Secretary of State for Trade as follows: " . . . we believe that the right way to sort out . . . differences of policy and approach is by inter-governmental discussion and negotiation through the established international organizations by which trade policy is coordinated multilaterally . . ."

(15) France has Loi No. 80-538 of July 16, 1983 'relative à la communication de documents et renseignements d'ordre économique, commercial ou technique à des personnes physiques ou morales étrangères'; South Africa has No. 99-1978 Protection of Business Act (as amended by Amendment No. 114-1979); Switzerland has Swiss Criminal Code, Article 273 (1937) which prohibits disclosure of economic information to foreign officials or foreign private enterprises; the Netherlands has the Economic Competition Act of June 28, 1956 which forbids deliberate compliance with actions by other states relating to regulation of competition; Australia has the Foreign Anti-trust Judgements (Restrictions of Enforcement) Act 1979; et al.

The Impact on International Aviation

International aviation is only one of many forms of trade between nations. However, it has its own peculiar characteristics resulting from the varying objectives each Nation State seeks from its air services. To some, aviation is an instrument of social policy, whereas others see it purely in commercial terms. As a result, international aviation represents a contrasting mix of private and state-owned enterprises.

What allows such diverse interests to function in harmony is a worldwide network of bilateral agreements, many of which are interdependent. And that is why it is vital that unilateral actions do not frustrate the many roles which aviation can and should play in our increasingly-complex modern world.

Despite the importance of air transport to so many aspects of national life, more and more governments are applying purely commercial criteria to international aviation with little regard to the social consequences. This stems primarily from political reaction to consumer pressures where the price of an airline ticket has become the determining policy factor; and even a domestic political factor. This obviously makes life difficult for the airlines, given the various other requirements placed upon them. But in broader, more important terms, it has profound ramifications in the way air transport should be regulated internationally.

When the Chicago Convention was developed, no international airline, government or privately owned, operated on a fully economic basis. We should remember this well. In the process of adopting new attitudes towards our international flag carriers, we run the risk of overlooking the fact that some important regulatory norms were developed with virtually no experience of modern aviation. That the norms have successfully guided our industry for nearly 40 years is a great tribute to the foresight of those who, at Chicago in 1944, set down the framework.

Paradoxically, part of that success may have sprung from the partial inability of governments at Chicago to deal comprehensively with economic regulation of international services — the exchange of operating rights and the conditions for their exercise. Like today, Chicago witnessed a complete spectrum of economic policy attitudes; it was not surprising therefore that agreement between the 54 participants could not be unanimous.

From the basis of Chapters I, II and III of the Chicago Convention, two results flowed:

1) international airline representatives at Chicago were explicitly directed to create an inter-airline method of developing international fares and rates;

> Mindful of tariff and subsidy wars of the 1930s, the delegates recognized that pricing had to be dealt with on a multilateral basis. And, since governments were loth to get involved directly, they expressly instructed their airlines to seek a multilateral negotiating mechanism. The dormant International Air Traffic Association — founded in 1919 — was revived in Havana in 1945.

ii) the main elements of economic regulation were to be governed by bilateral agreements among States;

> In 1946 philosophical differences were resolved in the benchmark bilateral compromise between the UK and the US in Bermuda (Bermuda I). Inter alia, the parties agreed that tariffs would be worked out at first instance by the airlines themselves, using the available IATA machinery as a multilateral negotiating forum.
>
> For thirty years this first Bermuda Agreement served as a model for over a thousand bilaterals, which in one form or another recognized the multilateral pricing mechanism. And we now have some 150 civil aviation nations — including 40 African, 20 Arab and 20 Latin American — in ICAO, rather than the original 54. And the 45 founding fathers of IATA are now 124, each with different costs, perceptions of market need and ultimate goal. All are accountable to governments, in one way or another. There are many non-IATA scheduled carriers. There are also charter operations. And, as the economic importance of air transport has increased, governments — some inspired by consumerism, others by tourism — have begun to play a greater role in the tariff negotiations.

These two elements have thus developed into a highly workable de facto multilateral system.

- Since governments were not equipped to apply a coordinated and inter-related network of air fares and rates upon which coherent development has been possible, they had to turn to industry organizations to perform the task. As both a catalyst and a participant in system development over the years, the IATA mechanism has had to show great capability to adapt to increasing requirements for flexibility, transparency and innovation. Legal and consumer needs have been absorbed and reflected by the variety of adjustments of the machinery.

- By virtue of the model Bermuda I agreement, broadly-standard terms have been applied worldwide to the exercise of capacity, frequency and associated commercial issues. The main variant remained, as always, the extent of route 'rights' granted; these represented the economic quid pro quo in bilaterals. (16)

Because most airlines must now be self supporting economically, it becomes a vital part of international regulation that they be given the opportunity to operate in a non-discriminatory and relatively predictable trading framework. Without these ingredients, we are faced with system paralysis. As every nation has a direct stake in international aviation, repercussive protectionism can spread with alarming speed.

The Use of Anti-trust Laws to Regulate

There have been many suggestions since the US deregulatory moves of the late 1970's that the 'free market' principle should govern the airline industry, thereby creating a more competitive environment responsive to consumer needs. It has not always been made clear, however, that even the removal of direct government policy regulation would not produce complete freedom of operation. Deregulation, in other words, does not mean 'laissez faire'.

In 1978, innovative US economist Alfred Kahn, while Chairman of the CAB, set out a blueprint for international 'free market' regulation by anti-trust laws. His comment at the time was that "one does not assure the survival of a regime of competition by a policy of mere 'laissez faire'. This is why we have anti-trust laws. And least of all will 'laissez faire' suffice in an industry controlled — not entirely effectively, thank God — by a government-sponsored cartel. The preservation of a competitive market structure sometimes requires us to protect some suppliers from the application by more powerful rivals of competitive tactics that deny them an opportunity to compete *for*

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(16) A (temporary) exception to this occurred in the US liberal bilateral strategy 1978-1982 ("routes-for-rates").

reasons that have nothing to do with their comparative efficiency in serving the public.

"This last qualification is very important, because it provides the basis in principle for distinguishing governmental interventions whose purpose is to preserve the vitality of the competitive process from interventions directed at the mere protection of individual competitors from that process.

"The distinction is very hard to draw in practice, but I don't see how one can deny the necessity for doing so — particularly when there are in the market powerful firms, or groups of firms acting in concert, with monopoly power and the ability to bring that power to bear to deny more specialized rivals a fair opportunity to compete; and particularly also when governments with protectionist policies control entry (or reentry) of competitors into international markets." (17)

It is essential, therefore, to recognize the important quasi-regulatory role of anti-trust and competition laws in a more liberalized international market. This could perhaps best be illustrated by contrasting the more protective approach which the US has shown to its maritime industry, where US carriers are less able to compete in international markets than their aviation counterparts.

This attitude has been succinctly described as 'mercantilism'. Former Deputy Secretary, Aviation and Shipping, of the UK Department of Trade, Patrick Shovelton (who also led Britain's Bermuda II delegation), maintained that "the plain fact of the matter is — and let us have no hypocrisy about it — that both of us (US and UK) believe in mercantilism — that is to say, in promoting and developing our own commercial interests." (18)

This definition of mercantilism was explained by UK Trade Secretary, Edmund Dell, as "not so much a theory about the way nations ought to enter into international trade relations so much as a description of the way they do, in fact, enter into such relationships. They seek to look after their own interests. Their interests in civil aviation are very often measured in balance of payments terms. "Mercantilism is just a bad word, recently revived, to describe the normal process of calculation of national interest and regulation of national activities in which governments engage, sometimes misguidedly, when they have some power to exercise and where they see some national interest at risk or some advantage to be gained." (19)

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(17) Presentation to a Symposium on "The Changing Environment of International Air Commerce", Georgetown University, Washington, D.C., May 4, 1978.

(18) "Bermuda II Et Al". 38 *Chartered Inst. Transp. Jl.* (1079) No. 10, 289 at 292. The speech was delivered at the Brancker Memorial Lecture in London on February 12, 1979.

In a multilateral setting, one would expect a greater degree of self restraint in pursuing purely mercantile interests. That is because multilateralism, as a more enduring basis for agreement, should transcend mercantilism and political opportunism. This is not merely prescriptive belief. It is a direct result of the desire to compromise under the long term collective interests. Equally important is that trade organizations and governments recognize this implied condition.

By way of contrast, the International Chamber of Commerce's Policy Statement on International Ocean Liner Shipping strongly supports harmonization by shipping conferences — although its recently-adopted air transport policy statement assumes a much less positive approach towards air carrier conferences. In fact, the ICC's 1982 annual report highlighted the following points on its shipping policy:

- "Self-regulation by conferences should be vigorously encouraged since it is both less costly than government regulation and more readily adaptable to evolving market needs." (20)

- "The services provided by liner shipping carriers, whether conference or non-conference, should result exclusively from response to market needs and not from political considerations."

- "The international harmonization of the framework within which liner shipping may operate should be promoted as a long term objective."

- "The international character of liner shipping requires all governments to respect the views of other nations ... In particular, governments should not seek to impose their domestic anti-trust laws, either unilaterally on the shipping industry and/or in such a manner as to give such laws extraterritorial effect, thereby creating situations in which disputes arise."

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(19) Speech to the Financial Times Aerospace Conference, August 31, 1978.

(20) The shipping industry was subjected to US anti-trust laws in the late seventies and more than $6 million in criminal fines levied against seven Atlantic shipping lines and their executives for illegal acts *outside* the conference immunity umbrella. Private treble damage suits are still outstanding involving hundreds of millions of dollars.

A further example of differing terms is provided by the European Communities. At a time when the European Commission is strongly pressing for a more competitive air transport system, threatening to preclude many cooperative aviation activities, the Council of Ministers of the EEC, on June 17, 1983, adopted a decision mandating far-reaching commercial cooperation between railway undertakings, including the freedom for railways to create revenue pools.

The decision stipulated that:

- railway undertakings shall have the freedom to determine transport rates and conditions in accordance with the market situation and their own commercial interests and may establish international transport rates independent of domestic transport rates and create revenue pools within the framework of communities of interest.
- the railways shall, in management of their international traffic, aim at obtaining optimum revenue for services and improve their financial situation. Coverage of specific assignable costs and a positive contribution to the coverage of joint costs should be ensured.

The decision also envisaged the possibility of setting up a joint organization to implement commercial measures; and Member States of the EEC were requested to take the necessary action to implement the decision itself before July of 1984. (21)

It is difficult to understand, therefore, why air transportation is not treated on the same basis as other means of transportation. We see the direction being taken with regard to European railways. And while the maritime industry has been subjected to US anti-trust laws (as mentioned earlier), there has been no direct confrontation in the nature of the CAB's Show Cause Order as in the case of the airline industry.

This (and in a different way, the Competitive Marketing Investigation) was a specific attempt to apply US anti-trust regulation to international air transport pricing by the technique of eliminating the 30-year anti-trust immunity for airline cooperation within IATA. The result of this move was individual and collective protest to the US State Department by more than 100 foreign governments and a virtually unanimous resolution of the Second Air Transport Conference of ICAO, essentially condemning unilateral attacks on the airline coordination machinery.

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(21) The first step towards establishment of a 'European Railways IATA' has, in fact, already taken place with a draft submission by the Commission on July 5, 1983 (and reported in the official Journal of the European Communities No. C191-10 of July 16, 1983) entitled "Proposal for a Council recommendation to the national railway companies of the Member States on strengthening their cooperation in the commercial management of international passenger and goods transport by rail."

This particular problem has been postponed rather than resolved since the Show Cause Order 'deadline' still hinges on CAB decision-making and there is indication that responsibility for approval and immunization of conference agreements could well pass to the Justice Department rather than the Department of Transportation after the CAB Sunset.

Undoubtedly, there is a need for restricting practices which are generally recognized and agreed to be anti-competitive and harmful. It is questionable, however, whether in international relations there is a place for a regime under which control is exercised by the courts of one country and whichever private citizens who choose to sue.

Settling International Aviation Policy/Legal Disputes

The heart of the matter confronting us today is: how can national aviation trading policies be harmonized? And how can legal conflicts which disrupt or paralize the system be minimized? As general problems, these are as old as the existence of Nation States. The fact that international trade and communications have prospered bears testament to the overall success in identifying and solving particular problems.

Aviation, in these terms, is a relative newcomer. It is no longer the hothouse plant of former CAB Chairman Kahn. But neither is it something which can be left to the Darwinian process of survival of the fittest. International aviation permeates many aspects of trade and communications and disruption of the system rapidly flows through to its dependent products. The network itself is complex and interdependent, painstakingly built on international negotiation and sovereign compromise.

Indeed, international aviation has provided remarkable compromise where seemingly impassable legal barriers existed. As soon as aircraft flew between two countries, a vast range of technical, safety and other specifications had to be standardized. This was done first through the Paris Convention of 1919 and Havana of 1929. The 1944 Chicago Convention maintained this initiative and arguably went further than any other multilateral convention in establishing a de facto legislative role on technical matters unique in international law.

Problems regarding compensation for victims of accidents were resolved through the 1929 Warsaw Convention and its subsequent protocols and associated agreements; again, achieving the seemingly impossible, by standardizing private law principles in a vast range of differing legal systems. A further agreement, the Rome Convention of 1952, provided similar standards for accident victims on the ground.

More recently, the international community came together to write a new page in international aviation law by agreeing to norms for countering hijacking and related forms of unlawful interference. The multilateral conventions concluded in the Hague, Montreal and Tokyo required massive concessions, both legal and political, on the part of many of the states involved.

The product of these multilateral exercises was clearly a recognition that public well-being and the integrity of the aviation structure itself was of such importance that legal and policy issues became secondary. This recognition alone, however, is not enough. To overcome the massive collective inertia of more than 150 separate governments, each with its critical national priorities, requires leadership and especially perseverance by key interested parties.

Yet these precedents are not as keenly commercial as the issue facing us today, namely, sporadic international regulation by national laws. It directly threatens economic operation and the very existence of air services themselves.

Since the Second World War, ICAO has stood unchallenged as the forum for resolution of any aviation-related problem. Today, with every aspect of airline economics in full public view and many governments seeking greater commercial involvement in their airlines' activities, it is the trade ingredient of air transport rather than the technical one which is highlighted.

Other organizations therefore become interested. UNCTAD, GATT and the OECD have all recently explored service trade issues which include international aviation, relating mostly to protectionist activities. Their responses are generally in the context of transport overall or of categorization within service industry structures. In itself, this suggests two important and sometimes conflicting roles for aviation. And that is what makes it so unique in nature. It is a form of commercial enterprise and at the same time an indispensable public service.

In seeking to establish an international understanding which will allow for reasonable compatibility between these conflicting roles, there is first a need to identify the various problems — at the legal, policy and diplomatic levels — as they are perceived by the majority of airlines and governments. Then, in search of a solution, the commitment must be made to use an established mechanism for international agreement in order to develop guidelines for problem-solving which are responsive to, but not overcome by, the wide range of national economic and legislative policies involved.

For instance, these guidelines could be drawn up under the auspices of ICAO so that no individual government could exploit the current legal vacuum in pursuit of commercial advantage or imposition of economic and legal philosophy.

Such guidelines could include:

- Interim political agreement that states will not seek to achieve policy objectives through exploiting a legal vacuum; thereby supplementing key procedural rules agreed within the OECD some years ago. (22) (The main purpose would be to avoid unilateral regulation of international air transport through extraterritorial implementation of national or Community competition laws).
- Development by the ICAO Council, either directly or through a panel of experts consisting in part of Legal Committee members, of recommended guidelines for resolution of such disputes. (In parallel with this, the Council could consider developing a model bilateral clause along the lines of the existing tariff clause.)
- General acceptance that disputes arising should be put to arbitration, either through the provisions of the bilateral agreements or by an independent commission established for the purpose.
- Application of the experience and precedent created through these steps to work, again under the auspices of ICAO, towards a general code of conduct to which ICAO states would adhere.

In Conclusion

The value of international aviation to the world community is such that we must take special steps to allow its continued evolution as an essential tool for the 'One World' economic and social system without placing unnecessary man-made obstacles in its path. Paralysis of the international network is the clear alternative.

In taking corrective action, we must however recognize that the problem we face is symptomatic of a broader international malaise and that a genuine concerted effort to retreat from 'the brink' is needed. The words of former US Ambassador to the European Community and a Member of the Trilateral Commission, J. Robert Schaetzel, give the direction:

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(22) OECD recommendations concerning cooperation between Member States on restrictive business practices affecting international trade.

> "Renovation of the system is theoretically possible. The basic ingredients are there: institutions, machinery, even the habit of communication. The missing element is the failure to understand that a viable system, one capable of coping with a disorderly and dangerous world, must be vested with an element central to any working democratic society: compromise. Compromise involves acceptance of the fact that solutions to problems will be imperfect, generally messy, with no contending group fully satisfied." (23)

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(23) *International Herald Tribune*, April 16-17, 1983.

NÉCESSITÉ D'ASSURER LA COMPATIBILITÉ ENTRE LES JURIDICTIONS

On examine ici les principes de droit plutôt que le droit lui-même, parce que la solution à l'écart croissant entre les nations dans les domaines juridique et économique ne réside pas nécessairement au sein de tribunaux rigides mais dans des accords intergouvernementaux faisant preuve de diplomatie. Malheureusement, il n'existe ni règles ni procédures satisfaisantes et reconnues sur le plan international pour contrer les divergences et les contradictions entre les législations nationales lorsqu'elles sont appliquées unilatéralement hors du territoire national. Le problème se pose pour le transport aérien international, non seulement en tant que cible, mais surtout en tant que victime prise entre deux feux, étant donné la nature particulière de son intégration mondiale.

On traite donc des problèmes créés par la divergence des juridictions dans le contexte du réseau aérien international. On trouvera une analyse de la tendance et des motifs de l'application de concepts juridiques et de politiques nationales au-delà des frontières qui donnent lieu à des législations multiples à travers le monde, bloquant l'application des lois étrangères, d'où la nécessité d'un code de conduite ou d'une procédure qui inverserait le courant et assurerait le mécanisme nécessaire pour éviter toute incompatibilité sur le plan international.

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Mr. **HAMMARSKJOLD**. For purposes of this hearing, I can best describe the dangers of judicial regulation of international aviation by addressing three examples.

The first example is the so-called show cause order. Until the SCO, IATA's cooperative endeavors on behalf of its members, including tariff coordination, had enjoyed the approval of governments throughout the world, including the CAB, for almost 40 years. As you know, in the face of the united and hostile foreign reactions and responsive to concerns expressed by the administration and Congress itself, the CAB narrowed considerably the scope of its investigation and ultimately decided to continue approval for the IATA tariff coordination for a limited period. However, it specifically disapproved the U.S. carriers' participation in United States-Europe meetings.

This decision has been stayed by the CAB because of the obligations incurred in the U.S.-ECAC memorandum of understanding on North Atlantic pricing, the so-called MOU, but the ultimate outcome is in doubt due to certain uncertainties over the MOU.

Personally, I am convinced that the MOU is a useful, perhaps presently even indispensable communications vehicle for North Atlantic governments and airlines, and that with common sense and a mutual effort, ways will be and, in fact, must be found for a more refined North Atlantic arrangement between the governments concerned for the benefit of the public and the industry and minimizing government involvement in the marketplace.

We believe it is unreasonable for a threat such as the SCO to continue to hang over the heads of the international aviation community.

IATA has accommodated to new views on competition by adopting new flexible procedures which cater to innovation and are wide open to government scrutiny. Both the Departments of State and Transportation are on record urging that the CAB terminate the SCO. The President himself intervened at one point. Even the Justice Department has acknowledged that it is not IATA which stands in the way of a more competitive international system, but the divergent policies of governments. In the other transportation area of shipping, conferences enjoy mandated immunity under U.S. law. The International Civil Aviation Organization has adopted several resolutions reiterating support for IATA tariff coordination and urging all States to refrain from disruptive unilateral actions. The Congress itself has questioned the wisdom of the proposed CAB actions.

My second example is the Competitive Marketing Investigation. These hearings do not concern the details of the CAB's final decision; however, it is important for this committee, I believe, to understand the full implications of that decision in relation to judicial regulation of international aviation.

The proponents of the CAB decision make it appear that because the CAB approved most parts of the agency programs and found that they basically served a public need, the withdrawal of antitrust immunity in 1985 will not pose a problem. This is simply not true.

What the CAB really said was that some approved features of the program were on shaky ground, and the CAB would leave it to the industry to make changes, or—and this is the important part—face antitrust suits. This is the epitome of judicial regulation of international aviation and the central problem with the CAB's final decision.

The IATA agency programs cannot survive without antitrust immunity. I know that you have heard that this assertion is without foundation, that other industries survive and prosper without antitrust immunity, and that there is no reason why the airlines cannot accommodate to a no-immunity environment. But international air transport is not just like other industries.

For one thing, it seeks in many situations to sell joint products. And I believe uniquely, it's very existence is dependent upon agreements among numerous sets of bilateral sovereign partners.

The IATA member airlines, including the 100 or so non-U.S. airlines, have operated the U.S. agency programs for many years in the knowledge that, when the U.S. Government approves these arrangements, they will not be subject to a double test in U.S. courts.

Their only choice if immunity is now withheld would be to alter the agency's programs so that there would be the same degree of risk as there is now. Our counsel advises this would require that each airline member individually establish standards for the appointment and retention of agents. This would defeat the very purpose of the program, which is to avoid the costs of individually estabished and administered standards, and would inevitably lead to their abandonment.

This process is also bound to lead to the international frictions as other governments charge the United States with violating the fair and equal opportunity provisions of bilateral agreements.

Let me dispel one myth which has been perpetrated; namely, that opposition to the CAB decision really comes only from the agents. I can assure you that the IATA member airlines not only want to keep the agency programs, but also need them to retain an essential marketing tool at less cost than any alternative. If any U.S. Government official has any doubt, I invite him or her to observe IATA's upcoming passenger agency conference to hear what our member airlines believe on this point.

My third example of judicial regulation of international aviation concerns the intention of the Department of Justice, with apparent Department of Transportation approval, to apply the no immunity approach to all nonpricing agreements among airlines, including, apparently, arrangements outside the United States which might still be subject to the reach of the U.S. antitrust laws.

Some cooperative agreements among airlines of a technical nature may not raise competition issues and perhaps can survive without antitrust immunity. However, the wholesale approach of approving agreements and then denying them immunity will only create the same kind of problems for many other programs as in the agency field. Programs that are accepted as worthwhile will be abandoned, and foreign sovereigns will not accept the fact that, by withholding immunity for non-U.S. programs, they can be challenged in U.S. courts.

You have seen that we believe judicial regulation will wreck worthwhile IATA programs and lead to international frictions. But the danger does not stop there.

Once the judicial branch has been delegated the task of regulating intercarrier behavior, the United States will not even have the means to deal with, bargain for, or negotiate international matters involving cooperative agreements among carriers, because control of the subject matter will be in the hands of the independent judiciary.

I wonder, how U.S. Government negotiating officials would respond if told by a government that it could do nothing about unfair or discriminatory practices because the courts of that country are in charge. The United States should want to have adequate means to implement its policy goals and objectives effectively.

Judicial regulation will weaken, not strengthen the United States in this regard. The United States will also be more effective if all of the international regulatory functions, particularly section 412 and 414 of the act, are under one roof. Up until now, the fact that the executive branch negotiates agreements which the CAB implements has sometimes created confusion and led to ineffective implementation of policy. Now that the executive branch will both negotiate and implement, these deficiencies will disappear. If, that is, the job is not again split up among different agencies.

From an institutional perspective, we believe that the 412 and 414 functions should be transferred to DOT and not to DOJ. The DOJ is basically and historically against industry cooperative programs. The record is replete with instances of its opposition to cooperative proposals, just those involving IATA, many of which the CAB nevertheless approved.

While this is evidence enough, DOJ is perceived abroad as being a doctrinaire agency which follows a dangerous path of applying domestic theories to the international marketplace without regard to the interests of the international community, including those of United States itself.

My testimony points to certain conclusions regarding the questions before this committee.

The first and foremost is that there should be sunset legislation, which includes the transfer of sections 412 and 414 of the act to the Department of Transportation.

In fact, we believe that all international functions should be in one agency, namely the Department of Transportation. While this will go a long way to avoid or ameliorate the problems I have referred to concerning judicial regulation and effective implementation of U.S. policy, it will not necessarily be sufficient.

I therefore, also urge this committee to consider other steps to signal its disenchantment with the growing trend toward judicial regulation of international air transport, and its desire to improve the effectiveness of U.S. policy implementation. The committee could call for an end to the show-cause era by proposing that the show-cause order be terminated. The United States retains ample means to safeguard its interests without relying on the outmoded and tarnished vehicle of the SCO.

The committee also could endorse the Air Travelers Security Act to ensure that the IATA agency program is not regulated by the judiciary.

A more firm signal regarding judicial regulation of international aviation would be to amend section 414 of the act to provide that immunity must be given to all competition sensitive international agreements approved under section 412.

Mr. Chairman, I thank you for your attention.

Mr. **Mineta**. Thank you very much, Mr. Hammarskjold. In Secretary Dole's testimony last week, she stated that the Department of Transportation had been working with the Department of Justice to be responsive to two antitrust matters of concern to the airlines.

First, the Departments of Transportation and Justice have agreed that Justice will deal only with the organic agreements of IATA, leaving consideration of fares and related matters to DOT.

Second, Secretary Dole pointed out that Justice has agreed to consider granting limited antitrust immunity to prevent treble damage recovery where there is likely to be vexatious antitrust litigation. Secretary Dole said she believed that as a result of the agreements reached, the airlines and others are becoming more comfortable with the Department of Justice existence of the antitrust functions.

I take it that her comment does not represent the views of the airlines represented by IATA. Is my understanding correct? And if so, could you explain why the Secretary's assurances do not relieve your concerns?

Mr. **Hammarskjold**. Mr. Chairman, you are correct in your assumption. The explanation very clearly could be taken from the quote of one of your own speeches recently. If I may. You said, on January 17 to the International Aviation Club in Washington that "the administration, in furtherance of its no bill position, appears now to be promising the industry that all Justice's teeth will be removed before the airlines are asked to insert their collective head into the lion's mouth. We seem to be operating in the promise-them-anything-and-sue-them Arpege mode. I would suggest to you that the half-life of those promises cannot be guaranteed and might be very short, and that the antitrust authority over this industry, once given to Justice, will remain there long after both the promises and the Aperge have worn off."

It could not have been said better.

Mr. **Mineta**. There have been representations by DOT and others that recently the Department of Justice has become less doctrinaire in its attitude. That the antitrust laws should be followed even in cases in which there are transportation benefits to be achieved by allowing exemptions.

Have you seen any indication that the Department of Justice has become less doctrinaire? If so, do you think that we can rely on this new attitude continuing in the future?

Mr. **Hammarskjold**. We have listened to what has been said by the Department of Justice. We have had our own experience. We have somewhat researched the past public statements which have been made officially. And we are not convinced.

Mr. **Mineta**. Have you or any IATA representatives been invited to any meetings at which the Department of Justice discussed how they would administer sections 412 and 414?

Mr. Rein, what points did Justice make at those meetings? Did you find any of those arguments convincing?

Mr. **Rein**. Mr. Chairman, they first explained the same thing that Secretary Dole did. That is, the reported division of responsibilities with respect to the IATA rates and fares agreement situation, where they would look at the so-called organic elements of the agreements, and the DOT under its tariff authority would look at the actual rates and fares levels.

They took the position that that was not only a good accommodation but one that had to be done under the statute because Justice had no direct authority over rates and fares.

I was a little troubled by that because it did not appear that they had thoroughly thought through the dividing line between what is a rate and a fare, and what is an organic agreement. In the IATA conferences we often work on matters such as fare construction. How do you deal with a situation in which no specific fare has been established, but you are trying to construct fares out of a series of carrier offerings, some of which have been coordinated and some of which have not been coordinated?

We have interlining agreements that relate to the economics of flight, but are not necessarily rates or fares of the kind filed in tariff. We were unable to ascertain whether there was a clear dividing line between economically or fare related, if you will, agreements and agreements which were organic. Those words are used, but I do not think anybody understands what they mean.

I think in that instance we felt that there might be significant period of confusion with nobody being essentially willing to take the responsibility for anything, with also perhaps over-regulation on the tariff side, because if Justice wants more and more substantive consideration by DOT, the only vehicle will be to force more and more elements of agreement into the tariff, so that the DOT becomes the agency with regulatory jurisdiction.

In that regard there is a substantial advantage in consolidating the function in one agency which can look at the agreements and all other aspects and make a straight decision as to whether they are consistent with the requirements of the act, or not consistent.

Justice also, I think, has attempted to convey its new realism, particularly with respect to the limited antitrust immunity. Again, words are conveniently used, such as "we would prevent vexatious litigation," yet it's not at all clear what you mean by "vexatious." Some litigation is deemed by Justice to be good. That's not vexatious. And it is only vexatious if they think it does not serve a useful purpose. They explained that it could even serve a useful purpose if they disagreed with the result but felt it was a close enough case that it ought to be tested in the courts.

We've seen very recently, and I am sure you have, an example of this later matter in which a private party initiated litigation and two governments were brought head-to-head in confrontation by a privately generated activity by a foreign national. And just yesterday, the Court of Appeals issued a decision saying, in effect, we cannot do anything about this. We are forced to confront the courts on the British side. We have no way to negotiate with them. We are in an impossible situation, and yet the powers of the judiciary can see no way out. We believe the British courts are in an equally impossible situation and we wish somebody would do something about it.

One thing we know, that Justice has not contemplated a substantive negotiation over the differences in view on competitive regulation between the United States and other countries. And we would think that DOT institutionally would be more flexible.

I think Justice people will honestly try to fulfill their responsibilities if they have to undertake them under the Act. But it seems to me that their thinking is very rudimentary. And it is largely governed by the administration's wish not to have a bill, rather than by any substantive decision that it would make sense for DOJ to have these functions.

Mr. **Mineta**. Mr. Hammerschmidt.

Mr. **Hammerschmidt**. Mr. Hammarskjold, Mr. Rein, Mr. Lipman and Mr. Styles, we appreciate very much your patience and your appearance before us today. Mr. Chairman, I would like to submit questions in writing so that these gentleman have the opportunity to respond and we can have a more complete record.

And with that, I believe that is all I have, Mr. Chairman.

Mr. **Mineta**. Very well.

Mr. **Hammarskjold**. We will be happy to answer in writing.

[The questions submitted by Mr. Hammerschmidt and responses received from Mr. Styles follow:]

International Air Transport Association,
Washington, D.C., March 23, 1984.

Mr. William H. Fleming III,
Subcommittee on Aviation, House of Representatives, Washington, D.C.

Dear Mr. Fleming: During the hearings on March 13 on CAB sunset issues before the Subcommittee on Aviation, several questions were submitted to Knut Hammarskjold, Director General of IATA, for later written reply. I enclose herewith the questions as submitted and Mr. Hammarskjold's replies.

Mr. Hammarskjold also indicated in his oral summary that he would like to submit for the record an article he wrote in the *Annals of Air and Space Law* of McGill Univeristy. A copy of this article is also attached for inclusion in the record.

Sincerely yours,

Michael H. Styles,
Regional Director, United States.

Questions for the International Air Transport Association

1. You are in favor of transferring all of CAB's current authority to DOT rather than transferring it to different agencies. On the other hand, those in favor of placing antitrust authority at the Justice Department and consumer protection authority at the FTC believe that the air transportation industry should be treated like other industies and that therefore it is appropriate to place these functions in the agency that deals with these issues generally. Why do you believe that your approach is preferable?

Answer. I believe it is clearly preferable that all of the CAB's international functions be transferred to a single agency, and that this agency should be the DOT. International air transport is not like the domestic industry, which is subject only to U.S. policy decisions and supervision. It is also not like other international industries, and therefore should not be treated like other industries in this respect. First of all, the very existence of international airline services is dependent upon the conclusion of a vast network of bilateral and multilateral agreements among sovereign governments, each of which will have its own policies on how airlines should be regulated. Governments must negotiate these differences and have the means to resolve differences effectively when they arise. That task would be much more difficult for the U.S. if the international functions were divided among several agencies. Secondly, international airlines are unique because they sell joint products. No matter how complicated a passenger's itinerary or how many airlines from different countries he needs to use, he can obtain a single ticket, pay for it in a single currency, and have the assurance that his ticket will be accepted anywhere in the world, however far from home he may be. These arrangements require that airlines from around the world hold discussions with one another. The responsibility for governmental oversight of agreements which accomplish these public interest goals should be in the hands of the agency most familiar with, and responsible for, transportation questions, namely, DOT.

2. You oppose transferring the CAB's antitrust authority to the Justice Department and you state that Justice is "basically and historically against industry cooperative programs." Nevertheless, the Justice Department has indicated that it would grant immunity to those agreements which were anti-competitive if it found that the public benefits outweighed the anti-competitive disadvantages. Are you concerned that the Justice Department would require such a strong showing of public benefit that it would never approve an anti-competitive agreement?

Answer. The recent indications of what policy DOJ will follow in administering Sections 412 and 414 of the Act are vague and inconsistent. For example, Mr. McGrath testified that DOJ would give some form of limited immunity to the Area Settlement Plan, while his predecessor, Mr. Baxter, testified that this plan could easily survive without immunity. Individuals and administrations will change over time. One must therefore look to the historical record. Here, it is clear that DOJ has opposed virtually every airline cooperative program submitted to the CAB. This includes many programs which the CAB found to be in the public interest under the Section 412 standards, including both IATA and other programs. In short, we are concerned that DOJ would tend to require such a strong showing of public benefit that few, if any, carrier agreements would ever receive immunity.

3. You advocate the termination of the CAB's show-cause order concerning the IATA tariff coordination activities. You also state the IATA has accommodated this government's pro-competitive position by adopting procedures for innovative tariff filings. Would you specify some of these innovative filings which have occurred recently?

Answer. IATA's general provisions now allow any airlines party to an IATA tariff agreement to institute a unilateral innovative fare or rate to or from the United States simply by filing a notice thereof with the IATA secretariat. This procedure is used frequently. To cite just one recent example, American Airlines filed a unilateral Apex fare, which is lower than the IATA level, between Dallas/Ft. Worth and London applicable in the March–April period.

4. You are critical of existing law which allows an agreement to be approved while denying antitrust immunity. Would you provide us with some examples of those agreements which have been approved by the CAB and not immunized and any problems that may have arisen as a result?

Answer. The most important and illustrative example so far is the IATA U.S. agency program which has enjoyed approval and immunity for almost 40 years. However, under the CAB's decision in the Competitive Marketing Investigation, that program will lose all antitrust immunity as of January 1, 1985. This will eventually lead to abandonment of the program, for the reasons I have set forth in my testimony. The CAB has approved, but not immunized, other agreements not involving IATA airlines.

5. You refer in your testimony to the fact that the existing U.S.-ECAC Memorandum of Understanding (MOU) on North Atlantic Pricing has allowed the continued approval of the IATA tariff coordinating activities although this approval has been issued on a temporary basis only. What is the current status of the MOU and do you believe that its provisions will be either extended or embodied in a more permanent agreement?

Answer. As of this date, the US-ECAC MOU will terminate on April 30, 1984, unless the parties reach agreement on a permanent accord by that time. IATA has always supported the MOU and hopes that the parties can yet reach agreement.

6. The Justice Department has what is known as Business Review Letter Procedures, whereby it states its enforcement intentions in certain circumstances and by doing this provides an advisory opinion to interested parties on whether their proposed conduct might run afoul of the antitrust laws. If the Justice Department did receive the CAB's current authority to grant antitrust immunity to inter-carrier agreements, do you believe that the existence of the Business Review Letter would assist international airlines and others in the industry in conducting their operations?

Answer. The Business Review Letter procedure was not designed to address questions arising from continuing carrier agreement programs, such as those developed through IATA. If this procedure were adopted for the hundreds of IATA agreements reached each year, the replies would only say whether DOJ believed each agreement was in violation of the antitrust laws. If the answer were in the affirmative, the agreement would then have to be filed for approval and immunity under Sections 412 and 414 of the Act. Unless DOJ intends to scuttle all airline cooperative agreements which raise the smallest competition question, there is no reason to use the review letter procedure when a procedure is available for reviewing and immunizing agreements. The Congress presumably enacted Sections 412 and 414 because it wanted to provide a procedure to exempt airlines from the operation of the antitrust laws when it in the public interest. It also presumably intended that the responsible administrative agency should utilize these provisions of law, rather than sidestep the responsibility by resorting to a procedure intended for industries not subject to 412/414-like provisions.

Mr. MINETA. Mr. Hammarskjold, thank you very much for your appearance here today. We will meet tomorrow in this room at 10 a.m., and the subcommittee stands in recess.

[Whereupon, at 4:52 p.m., the subcommittee recessed, to reconvene at 10 a.m., Wednesday, March 14, 1984.]

REVIEW OF AIRLINE DEREGULATION AND SUNSET OF THE CIVIL AERONAUTICS BOARD

(Legislative Proposals Relating to Airline Deregulation and CAB Sunset)

WEDNESDAY, MARCH 14, 1984

House of Representatives,
Subcommittee on Aviation,
Committee on Public Works and Transportation,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:07 a.m., in room 2167, Rayburn House Office Building, Hon. Norman Y. Mineta (chairman of the subcommittee) presiding.

Mr. Mineta. The subcommittee will please come to order. We are continuing the hearings on airline deregulation and the sunset of the CAB.

We are pleased to have, this morning, Mr. Paul R. Ignatius, president of the Air Transport Association, to start off the day.

Mr. Ignatius, the full text of your prepared statement will appear in the record at this point.

[Statement referred to follows:]

Statement of Paul R. Ignatius, President and Chief Executive Officer, Air Transport Association of America

I am Paul R. Ignatius, President and Chief Executive Officer of the Air Transport Association of America, whose 31 U.S.-member airlines constitute the major segment of the nation's airline industry. I am accompanied by Norman J. Philion, the Association's Executive Vice President, and by James E. Landry, our Senior Vice President and General Counsel.

We appreciate the opportunity to appear before the Subcommittee to discuss CAB sunset related matters and to respond to questions raised in your hearing announcement of February 9. Among those questions were: "whether any sunset legislation should be passed in this Congress; whether legislation is needed to insure continuation of CAB consumer protection authority and current CAB consumer protection regulations after sunset, and whether CAB's authority to approve agreements and grant antitrust immunity should be administered by the Department of Justice of the Department of Transportation."

As I pointed out during your oversight hearings last May, airline views on deregulation varied extensively in 1978. Nevertheless, the airlines quickly adapted to the new challenges and opportunities provided by the enactment of the Airline Deregulation Act of 1978. If any philosophical reservations remained about the wisdom of Congress' action, they were quickly set aside in the effort to find how best to conduct airline operations and meet public needs in the new competitive environment.

There continue to be differing views within the industry on some aspects relating to CAB sunset. These differences are certainly understandable in view of the realities of the highly competitive world in which the airlines exist. But I want to reaffirm the underlying principle of our testimony last year that federal economic regulation cannot now be reimposed without making a complete shambles of the air transportation system. We strongly oppose such reregulation. It is for this reason that we share your concern and the Administration's concern, that sunset related legislation could become the vehicle for attempts to reregulate the industry or for attaching special interest add-ons.

Accordingly, there are questions within the industry as to whether any legislative action ought to be pursued now and, if so, whether it can be limited in scope to those aspects essential to an orderly CAB sunset. There are also questions about what may or may not be considered essential, recognizing that perceptions likely will vary to some extent within the Congress and among the several parties of interest.

The airlines believe that there are three essential legislative matters that should be considered if sunset related legislation moves forward.[1] They are: first, jurisdiction over inter-carrier agreements and antitrust immunity; second, federal preemption of economic regulation; and third, competitive and consumer practices.

I would now like to discuss these matters in some detail, together with related airline views and recommendations. I will then conclude my statement by summarizing our position on the international programs that will be transferred to the Department of Transportation effective January 1, 1985.

INTERCARRIER AGREEMENTS AND ANTITRUST IMMUNITY

Section 412 of the Federal Aviation Act provides the Civil Aeronautics Board with the authority to examine and approve inter-carrier agreements and section 404 of the Act gives it the authority to immunize those agreements from the antitrust laws. As matters now stand, jurisdiction over those provisions of the statute will be transferred to the Department of Justice on January 1, 1985. We believe that the Department of Transportation, rather than the Department of Justice, should be the recipient of that authority.

Sections 412 and 414 provide important benefits to the travelling public and the airline industry. It is through these provisions that the airlines conduct various joint activities that are so essential to our efficient provision of services to the public. The best-known example of these activities are the travel agency program and its concomitant area settlement plan, and the scheduled airline ticket office program at military installations.

DOT is the appropriate agency to possess jurisdiction over sections 412 and 414 because the determinations that are made under these statutes demand transportation expertise. Such expertise should not and cannot be expected from an agency with the specialized role of enforcing the antitrust laws. The continued effectiveness of these provisions requires that they be vested in an agency that will exercise authority under them in an impartial manner. The agency that receives this authority must be committed to its appropriate use. It must be willing to engage in the delicate balancing of transportation needs and public benefits, on the one hand, and anticompetitive consequences on the other. We have misgivings about the Antitrust Division of DOJ, with its otherwise clear and overriding enforcement goals, receiving authority that is alien to its institutional mission.

Recent discussions with DOJ officials about this matter, although characterized by commendable candor, did not allay those misgivings; on the contrary, they reinforced them. The essence of the Antitrust Division's views may be summarized quite simply as follows. If a domestic agreement does seem to pose an antitrust problem, it will not be immunized because that would be unnecessary. If a domestic agreement does seem to pose an antitrust problem, it will not be immunized because that would be inappropriate. Lastly, immunity limited to preventing recovery of treble damages might be considered where the conduct has been or is likely to be the object of vexatious antitrust litigation. I don't have to tell you, Mr. Chairman, that the airlines are generally uncomfortable with the views that I have just summarized.

There are at least two shortcomings in the DOJ position.

First, sections 412 and 414—especially section 412—are highly structured statutes in which Congress expressed with particularity the discretion that could be exercised under them. Congress explicitly recognized in these provisions that certain carrier agreements which had significant antitrust implications should be permitted *if* they secured important public benefits or met serious transportation needs. Unfortunately, the philosophy that DOJ has expressed in its recent discussions with us and in its January 5, 1984 memorandum to DOT on this subject, as amended on February 10, 1984, is at odds with that Congressional recognition.

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[1] American and United differ in certain respects with the ATA statement and will submit their views in this connection separately. A number of other ATA member carriers will present supplementary views based on the ATA testimony.

Second, DOJ stated in that memorandum that it intended to encourage airlines not to file domestic applications. This suggests that DOJ expects that those two provisions will fall into disuse insofar as domestic agreements are concerned. Predictably, a governmental policy that actively discourages section 412/414 applications will diminish greatly the willingness of airlines to enter into or continue important joint programs which benefit the travelling and shipping public.

FEDERAL PREEMPTION

The second area that I wish to discuss with you is preemption. This is a matter of considerable importance to the airline industry.

Congress recognized in 1979 that contradictory and burdensome state regulation of airline activities could threaten the success of the Airline Deregulation Act. It responded to this threat by adding to the Federal Aviation Act section 105, which is its preemption provision. This provision has been quite helpful. We believe, however, that it must be clarified and strengthened for effective use after sunset.

We are concerned that, if we enter the era of complete domestic economic deregulation with insufficient federal preemption of the field of our activities, onerous and inconsistent state economic regulation of interstate commerce could develop. Such a development would not only frustrate the objectives of the Airline Deregulation Act, but also trigger the automatic and unintended imposition of a host of burdens which the Congress and state legislatures have consciously decided not to impose upon the industry.

We have identified three major preemption-related problems.

First, the preemption provision of section 105 applies only to air carriers holding title IV authority. By definition, this refers to CAB-issued certificates and exemptions which, under the terms of the Airline Deregulation Act, post sunset new entrants will not be able to secure. Furthermore, because Section 47 (the savings provision of that Act) raises questions about existing domestic certificate and exemption authority after sunset, airlines that currently hold that authority may not be able to rely upon that provision either. We believe that this matter can be corrected by amending the law to assure preemption either through the present or future holding of an air carrier operating certificate issued by the Federal Aviation Administration under section 604 of the Act or the holding of a certificate of public convenience and necessity on the date of enactment. This equitable change should protect both existing and future air carriers.

Second, section 105 by its current terms prevents states and localities from regulating the rates, routes or services of airlines that hold title IV authority. In this regard, the absence of a definition of services is particularly troublesome. Rates and routes are commonly understood transportation terms; services is not such a term. We are concerned that states and localities will be inclined to impose burdensome and conflicting service-related regulations upon airline operations. We consequently believe that the term services should be defined in section 105. We would be pleased to work with your staff on an appropriate amendment for this purpose. Such an amendment should also include a provision that codifies the incorporation-by-reference of ticket terms rule that the CAB issued in 1982. This provision would assure a uniform standard for such incorporations; it would not affect the content of incorporated terms.

Third, the demise of the domestic certificate of public convenience and necessity could arguably affect the application of some state laws to airlines which refer to the possession of such a certificate. Congress clearly did not intend that the application of these state laws would be altered by the CAB's sunset. We therefore propose that sections 105 and 604 of the Act be amended to state that an operating certificate will be deemed to be the equivalent of a certificate of public convenience and necessity.

COMPETITIVE AND CONSUMER PRACTICES

The third subject that I wish to discuss with you is competitive and consumer practices. This subject is closely related to preemption. The CAB has engaged in an extensive competitive and consumer practices program. It regulates such practices as oversales, baggage liability, and incorporation by reference of ticket terms.

There is general agreement within the industry that federal responsibility for these matters is far preferable to the potentially inconsistent demand of state regulation. Our belief in the need for uniformity in these matters convinces us that a federal agency should assume at sunset the CAB's responsibility over these practices.

Where that responsibility should be lodged is something about which our members have differing views. Many of them believe that DOT should assume it. They reason that since DOT will have the responsibility over competitive and consumer practices internationally, and for essential air service under the Airline Deregulation Act, it is the most appropriate recipient of the authority over such practices domestically. Other members believe that the Federal Trade Commission should receive that authority. They reason that competitive and consumer protection authority should be transferred to the agency that today exercises such authority over other unregulated industries.

There is broad agreement that a given competitive or consumer practice should be subject to the oversight of only one federal agency.

INTERNATIONAL AVIATION FUNCTIONS

Finally, I would like to provide the Subcommittee our views on the performance of international aviation functions after CAB sunset. Briefly summarized, we believe that the necessary fairness, equity and due process can be achieved without establishing a new CAB or a mini-CAB, to be housed in the Department of Transportation. Appropriate quasi-judicial safeguards are sufficient, in our opinion, to accommodate the decision-making responsibilities transferred to the Department of Transportation by the Airline Deregulation Act.

Our concern about a substitute CAB is a part of our larger concern and apprehension about reregulation. We do not believe such a structure is necessary or desirable.

The real question is the adequacy of the quasi-judicial process for the selection of U.S. carriers to serve in limited entry markets. Our view of the necessary elements for the process is as follows: mandatory use of Administrative Law Judges and the substantial evidence test; retention of existing policy considerations and case law, with changes adopted only through rulemaking; maintenance of appropriate adjudication procedures; provision for a review and appeal process of Administrative Law Judge decisions by the Secretary of Transportation, limited to affirmation or remand based solely on previously established policy and case law; strict adherence to the requirements of the Administrative Procedure Act; and continuation of existing rights to judicial review.

I would like to elaborate a bit on those essential elements of the process. First, we believe current procedures under which Administrative Law Judges receive evidence and formulate recommended decisions should be continued. While it is true that show-cause proceedings may provide a quicker method of determining international carrier selection, we believe that such a procedure would be inappropriate in limited entry markets. The opportunities to cross-examine witnesses, and to raise questions on the relevancy, accuracy, and sufficiency of evidence, are very important factors in these cases and they should be retained.

We also believe that Administrative Law Judges should continue to be guided by existing policy and case law in the course of reaching decisions. If there is a need for changing these policy considerations, or the effects of case law, it should be done through the rulemaking process, preserving the traditional rights of the parties of interest to participate.

The final decision of an Administrative Law Judge should be reviewable, in our opinion, through a petition to the Secretary of Transportation. The Secretary's authority should be limited to affirming the decision, or to remanding it where it is found that the Administrative Law Judge did not properly rely upon substantial evidence, existing case law, or previously established policy.

Along with the continuance of the Administrative Law Judge process, those rights which exist today for review by the federal courts should be continued. Moreover, there must be adherence to the requirements of the Administrative Procedure Act. Taken together, these procedures, requirements and opportunities should assure the fairness, equity and due process which must be maintained in the adjudication of international matters, which frequently become controversial.

Our views on the needed quasi-judicial process are not unlike those of the Administration, as set forth in the DOT Plan and the February 29 testimony of the Secretary of Transportation before the Subcommittee. We understand the Department intends in the near future to publish proposed rules and procedures fleshing out its basic plan, and we look forward to participating actively in that rulemaking. Our ultimate views could be affected by what is proposed in the rulemaking.

Mr. Chairman, that concludes our statement. Again, we urge that this Committee reject any proposals to reimpose government economic regulation of domestic air transportation. Our domestic routes and rates must be left to the competitive dictates of the marketplace, as Congress intended in enacting the Airline Deregulation Act of 1978.

Mr. MINETA. Please proceed.

TESTIMONY OF PAUL R. IGNATIUS, PRESIDENT, AIR TRANSPORT ASSOCIATION, ACCOMPANIED BY NORMAN J. PHILION, EXECUTIVE VICE PRESIDENT; AND JAMES E. LANDRY, SENIOR VICE PRESIDENT AND GENERAL COUNSEL

Mr. IGNATIUS. Thank you very much, Mr. Chairman. I am going to summarize my statement in recognition of the fact that you have a long list of witnesses, and it has been made a part of the record in full.

Accompanying me is Jim Landry, our general counsel, and Norm Philion, executive vice president of ATA. But more importantly, with respect to this hearing, Norm has been the chairman over the period of a couple of years of the ATA Task Force on Sunset and has devoted countless hours working with top people from our industry and developing a series of positions.

Mr. Chairman, I want to say that my first point is to reaffirm the underlying principle of testimony that I gave before your committee last year when it was looking at deregulation after the passage of approximately 5 years.

What I said then and want to reemphasize again today, is that we believe Federal economic regulation should not and cannot now be reimposed on the industry without making a shambles of the air transportation system. We strongly oppose such reregulation.

It is for this reason that we share your concern and the administration's concern that sunset-related legislation not become the vehicle for an attempt to reregulate the industry or for attaching various special interest add-ons.

Because of this concern, there are some questions within the industry as to whether any legislative action ought to be pursued now and if so, whether it could be limited in scope to those aspects that are essential to an orderly CAB sunset.

There are also questions about what might be considered essential, recognizing that perceptions can differ both within the Congress and among the various parties of interest.

We believe there are three essential legislative matters that should be considered if sunset legislation moves forward. They are: First, jurisdiction over intercarrier agreements and antitrust immunity; second, Federal preemption of economic regulation; and third, competitive and consumer practices.

This morning, I want to summarize our views on each of these three points and also, I would like to comment briefly on the question of the transfer of international aviation responsibilities to the Department of Transportation.

Beginning, then, with antitrust and intercarrier agreements. Section 412 of the act, as you know, provides that the Civil Aeronautics Board can examine and approve intercarrier agreements, and section 414 of the act gives it the authority to immunize those agreements from the antitrust laws.

As matters now stand, jurisdiction over those provisions of the statute will be transferred to the Department of Justice on January 1 of next year. We believe that the Department of Transportation rather than the Department of Justice should receive that authority.

We believe this for various reasons. Sections 412 and 414 provide important benefits to the traveling public and to the airline industry. It is through these sections that the airlines conduct various joint activities that are essential to our efficient provision of services to the public. Perhaps the best known of these is the travel agency program and its associated area settlement plan.

DOT is the appropriate agency to possess this jurisdiction over sections 412 and 414 because the determinations that are made under these statutes demand transportation expertise, which it has.

Now, we have had recent discussions with Department of Justice officials about this whole matter. While these discussions have been frank and characterized with, I think, commendable candor, they did not allay the misgivings we had about the transfer of this authority to Justice. Indeed, in some ways the discussions reinforce the misgivings.

The essence of the Justice Department's views can be summarized, I believe, in the following three thoughts:

First, if a domestic agreement does not seem to pose an antitrust problem, it should not be immunized because that would be unnecessary.

Second, if a domestic agreement does seem to pose an antitrust problem, it should not be immunized because that would be inappropriate.

Finally, immunity limited to preventing recovery of treble damages might be considered where the conduct has been or is likely to be the object of vexatious antitrust legislation.

I do not have to tell you, Mr. Chairman, that the airlines are generally uncomfortable with the views that I have just summarized. We urge the committee to lodge the authority for sections 412 and 414 in the Department of Transportation.

Let me turn now to my second point, Federal preemption. This is a matter like antitrust immunity which is of great importance to the airline industry.

Congress recognized in 1978, when it enacted the Deregulation Act, that it had to take steps to prevent the individual States from stepping into the vacuum vacated by the sunset of the Civil Aeronautics Board. Congress addressed this situation through section 105 of the Deregulation Act which went a long way toward dealing with the problem, but we need further clarification in the legislation that you now have under consideration.

The clarification is needed, broadly speaking, in two areas:

First, we believe you need to make it clear that an FAA operating certificate issued under section 604 of the act is deemed to be the equivalent of a public convenience and necessity certificate. We think that step will go a long way toward the clarification that we think is needed in respect to the situation in the States where a number of laws enacted over the years would be eroded were it not for this explicit kind of clarification.

Second, section 605 today contains the word "services," but the word is not defined. We think it would be desirable to define the word services and, in this connection we would be very pleased, Mr. Chairman, to make available our people to work with the committee staff in an effort to define this word appropriately.

So, those are the two main points that we think you need to consider with respect to clarification of the Federal preemption.

Now, the third area that I wish to address is competitive and consumer practices. This question is related to the earlier one on preemption. In our industry, among the carriers, there is general agreement that Federal responsibility for these matters is far preferable to the potentially inconsistent demands of State regulations. Our belief in the need for uniformity in these matters convinces us that a Federal agency should assume at sunset the CAB's responsibilities over these practices.

Where that responsibility should lie is something on which our members have differing opinions. Many of them believe that it should be assumed by the Department of Transportation. They reason that since DOT will have the responsibility over competitive and consumer practices internationally and for essential air service, it would be the most appropriate agency for exercise of this authority over domestic practices.

Others of our members, on the other hand, believe that the Federal Trade Commission should receive the authority and they reason that competitive and consumer protection authority should be transferred to that agency that today exercises such authority over other unregulated industries.

Though we are in agreement that there ought to be one Federal agency, you will be hearing from some of our member carriers with respect to which agency should receive the authority.

The final area that I wanted to address is the transfer of responsibility for international aviation to the Department of Transportation.

Briefly summarized, our position is that necessary fairness, equity, and due process can be achieved within the Department of Transportation without establishing a new CAB or mini-CAB. Rather, we think there are appropriate quasi-judicial safeguards which can provide for the fairness and due process, and the necessary insulation in this important area.

I have set forth in my statement a number of the provisions that we think should guide this effort.

Our views on the needed quasi-judicial process are not substantially different from those of the administration as set forth in the DOT plan and in the February 29 testimony of the Secretary of Transportation before this subcommittee.

We understand that the Department of Transportation intends in the near future to publish proposed rules and procedures that will flesh out its basic plan, and we look forward to participating in this rulemaking when it takes place. Our ultimate views, of course, could be affected by what the rulemaking actually will propose.

Mr. Chairman, this concludes my statement. Again I want to urge the committee to reject any proposals to reimpose Government economic regulation of domestic air transportation. Our domestic routes and rates must be left to the competitive dictates of the marketplace as Congress intended in enacting the Airline Deregulation Act of 1978.

At this point, I would be pleased to address questions that you and committee members may wish to put to me.

Mr. MINETA. Thank you very much, Mr. Ignatius. Your testimony makes quite clear the reasons for your position, that the authority to grant antitrust immunity should go to the Department of Transportation rather than to the Department of Justice.

Now, Secretary Dole testified about 2 weeks ago that the Department of Justice had explained its antitrust plans and policies to the carriers and that the carriers no longer had objections about antitrust authority going to the Department of Justice.

I take it that as a representative of the air carrier industry you would disagree with the Secretary on that point.

Mr. IGNATIUS. We had one large meeting and, as I recall, one smaller meeting with the representatives, high-level representatives, from the Justice Department. They explained how they would proceed under this authority.

As I stated in my prepared statement, their explanation did not allay the fears that were present. We left those meetings with some of those same fears—indeed, some of them reinforced.

I think I can explain this clearly, Mr. Chairman. There is a need here, as the Congress has enacted in legislation, to reach a judgment involving a balance on the one hand of antitrust considerations with, on the other hand, public needs and public convenience.

Under the mandate it is possible to reach a judgment that says in effect, the public is well served by this particular agreement. Whatever antitrust questions may arise are lesser in importance than the benefit attained. Indeed, immunity may even be necessary in order to achieve the benefit.

We believe that balance can be handled more effectively in the Department of Transportation because of its expertise in transportation and, with all due respect to the Justice Department and the candor with which they entered these discussions with us, the DOJ institutional emphasis is on antitrust per se.

We believe, then, that the advantages to the shipping public and the traveling public that have been achieved over the years require this balancing of interests, which necessitate a finding—where appropriate—that the public interest is served even though antitrust questions may arise.

Mr. MINETA. Suppose we do transfer section 412 and section 414 to the Department of Transportation, do you have any recommendations as to what we should do under those circumstances with section 408, relating to mergers, and section 409, relating to interlocking directorates?

Should each of these go to Justice, as under existing law, or to Transportation along with 412 and 414?

Mr. IGNATIUS. We believe that, having reached the point where we are as a deregulated industry in respect to these matters, that that authority should lapse and the airlines should be treated no differently than any other industry in respect to questions of this kind.

We think that is different, Mr. Chairman, than the question of the intercarrier agreements.

Mr. MINETA. You also discuss quite thoroughly the Federal preemption issue. Based on our review and on the testimony we have heard in these hearings, it appears that absent legislation, this industry faces the potential for very substantial preemption problems, beginning January 1. For example, FTC has testified that it would not have and would not exercise section 411 authorities on January 1. DOT has said that section 404 authority would no longer be exercised by an agency of the Federal Government.

GAO has pointed out that carriers would no longer receive Federal certificates under section 401.

Now, the combined effect of these changes would be, first, to leave the basic consumer protection authorities, such as baggage liability-limitations; incorporation by reference of ticket terms and conditions; overbooking and bumping, et cetera, unoccupied by the Federal Government. In addition ending the practice of issuing section 401 certificates could make the preemption section of the Airline Deregulation Act inapplicable, leaving carriers and passengers exposed to State initiatives for consumer protection.

If carriers no longer hold a section 401 certificate, various State laws which are drafted to cover carriers holding Federal certificates may no longer be applicable.

The potential, at least, for chaos and confusion seems enormous. I am wondering, would you agree with that assessment?

Mr. IGNATIUS. Yes; I feel very keenly that we need clarification of the law as it stands today, to assure Federal preemption with respect to economic regulation of the airlines. We believe, in looking at it, that the first and most important clarification that is needed is to deem the section 604 operating permit as the equivalent of the PC&N section 401 certificate about which you spoke. Those later certificates will no longer exist after the sunset of the Civil Aeronautics Board.

If you were to deem in the clarification of the legislation that the 604 operating permit was the equivalent, we think that would have the effect, Mr. Chairman, of preserving the intent of the State laws that you spoke of and would also prevent encroachment by the States into the area of economic regulation.

Now, there are other things that we think also need clarification. As I said in my statement, particularly definition of "services."

Mr. MINETA. You discussed a possible remedy to this preemption problem. Let me suggest another one. A number of us have been very concerned about losing the fitness determinations now performed by CAB under section 401 certification. What we are looking at is legislation that would specifically retain the current section 401 under which domestic certificates are used as the vehicle for fitness determination. Carriers would therefore continue to receive section 401 certificates in the same manner as they have since 1983. Carriers would therefore still be certificated under title IV, both for purposes of Federal preemption provision in section 105 and for purposes of various State laws. Also, we would specifically retain section 404 and section 411 as federally occupied authority. Taken in combination, that seems to be an approach which basically takes care of your Federal preemption concerns and I am wondering, do you agree with that?

Mr. IGNATIUS. We think that there are other considerations that need to be addressed before one should reach a final conclusion along the lines anticipated in your question.

Let me comment on what I think some of them are, taking up each of these sections that you spoke of.

With respect, first, to section 411, the competitive practices section. The carriers agree, as I said earlier, that this kind of authority should be transferred to a Federal agency, but they disagree—as I said—as to which Federal agency is the most appropriate recipient.

With respect to 401(d), which is the fitness section, I would make a distinction, Mr. Chairman, between an initial determination of fitness and a continuing assessment of it. It is necessary, of course, for a new carrier to be able to demonstrate to the FAA that it will be so organized and its procedures will be so set forth that it can carry out the requirements of the Federal Aviation Administration with respect to safety and operation.

In connection with that, the question has arisen as to whether this safety determination should also address the question of financial fitness. If the committee feels that it should—and from the proceedings that you have held so far I gather that you and many members of the committee believe that there should be provision for this—we would be very happy to look at your language and report promptly to your committee staff about our views.

But again I want to make a distinction between the initial assessment of financial fitness as part of the determination with respect to safety and operations, and the continuing assessment of financial fitness because I think you may be crossing a line if you say you want to continue fitness determinations. And the line you may be crossing is the line that separates economic regulation from dependence upon the marketplace.

Now, finally, section 404, I think, was also included in your question. Section 404(a) is the provision for safe and adequate transportation.

This is very broad. We obviously have no quarrel with that part of it that deals with "safe transportation," and the Federal Aviation Administration will continue to exercise Federal authority here.

It is with respect to the word "adequate" and the implication of that in terms of the point I made earlier, namely a return, or the potential for a return, to economic regulation which we oppose.

Mr. MINETA. On that latter score, do you have any problems with the way that it has been administered since 1983 as it relates to section 401? Have you had any problems or do you see any problems since we contemplate that being carried out in the same manner since 1983?

Mr. IGNATIUS. You are referring to the determination of financial fitness?

Mr. MINETA. No; I am sorry, on the "safe and adequate" aspect.

Mr. IGNATIUS. Safe and adequate, yes. The area that most commonly comes forward in this particular section, I think, is regulations with respect to smoking.

Here our position has traditionally been that this matter should be left to the carriers to handle. I believe the carriers are adequately handling it now.

Mr. MINETA. What about 401(d)?

Mr. IGNATIUS. Section 401(d)——

Mr. MINETA. Going to the fitness determination.

Mr. IGNATIUS. The purport of your question I think was, did we have any thoughts on how it had been handled since the 1978 act.

My understanding as to how it has been handled since passage of the act is that the safety determination would be made by the FAA, and we have had no problems with that, none of which I am aware.

Second, the FAA since 1978—and before as far as that goes—has depended upon the Civil Aeronautics Board with respect to those determinations having to do with financial fitness and managerial integrity.

Now, the question then arises, after sunset, should there be any specific authority to look into financial fitness and the general question of managerial integrity. I believe the General Counsel of the Department of Transportation said yesterday that he did not feel it was necessary to provide for any continuing authority.

I have said to you this morning that we have a substantial question with respect to a continuing authority in the area of financial fitness and managerial competence because that sounds very much, to us, as though it would cross that line separating economic regulation from the marketplace.

With respect to the initial determination regarding, a carrier that holds itself out to provide air transportation services and which comes before the FAA to make its case to receive operating authority, I am saying that if the Congress believes that there should be some kind of authority provided to assess the initial financial fitness as opposed to a continuing assessment, we would be glad to take a look at that, Mr. Chairman.

Mr. MINETA. In your prepared testimony you spell out the kinds of procedures and organization you would like to see used by DOT in administering its international aviation functions.

Is not what you describe the same as the proposed DOT plan, and should I take it from this that you are not urging us to legislatively specify procedures of organization other than those that are in the DOT plan?

Mr. IGNATIUS. Mr. Chairman, our position is similar to what the Department has presented to you, but it is not identical to it. The similarities involve many of the features that in sum provide for a quasi-judicial procedure based on the use of administrative law judges. We set forth in my statement a number of the specifics that we have in mind.

We differ in one detail from what the Department has proposed to you. The Department plan would involve the administrative law judge who, in turn, would report his or her determination to the senior career official, and that official is deemed in the DOT plan as the decisionmaker.

After that, the decision of this senior official can be remanded by the Secretary or by the Secretary's designate.

We do not, in our position on this matter, provide for the element of the senior official. Under the proposal that we developed, the administrative law judge in effect, after full hearing with a number of safeguards that we spell out, would make a decision which would be subject to remand by the Secretary. In this respect it is similar to what the Department is talking about.

So, in summary, there are similarities but we do not have an identical proposal and the essential difference is that the Department would add an additional element, a senior career official, to the process where as ours is dependent upon the administrative law judge with remand vested in the Secretary.

Mr. MINETA. Well, on that specific point, Mr. Ignatius, what is the problem that you foresee of the senior career officer dealing with the ALJ's decision or recommendation?

Mr. IGNATIUS. I am not sure that we necessarily see a problem in it. We developed our position as a result of the work of Mr. Philion's task force and that was done, to the best of my recollection, before we knew precisely what the Department had in mind.

I would suppose that in the Department plan it is the senior career official who is the decisionmaker. And what the relations are and what the metes and bounds of authority are in respect to this senior official as opposed to the ALJ, I was not so clear on when I heard the testimony. It is perfectly clear what the Secretary's responsibilities were. The Secretary could remand, or depend through delegated authority upon an Assistant Secretary to remand, and there are many safeguards the Department talked about in respect to that.

I was not so clear as to the difference between the authority of the ALJ on the one hand and the senior career official on the other.

Mr. MINETA. Later today, some of our labor union witnesses will propose that in conjunction with section 408, we should legislatively require that the so-called Allegheny-Mohawk seniority integration provisions be applied in mergers, although presumably Allegheny-Mohawk compensation provisions would not be mandated.

Do the carriers have a position on that kind of standardized seniority integration requirement?

Mr. IGNATIUS. The carriers do have a position on it, and I argued that position in their behalf in hearings a year or two ago.

We strongly oppose the enactment into legislation of the Allegheny-Mohawk-type provisions, Mr. Chairman. If there is one characteristic of the industry today it is the need to accommodate successfully to the dynamic situation that we face.

It is an obligation that we are perfectly willing to accept as part of the whole process of deregulation. But if we become encumbered with requirements that apply not only to mergers but to transactions less than mergers—exchange of assets, exchange of routes, many things of this kind—the hands of the managements are tied and their ability to cope with the economic forces they face is severely limited.

When I testified on this matter some time ago in the other body, there was with me at the table the then president of Braniff, Howard Putman. He stated before the committee that getting Braniff back into operation was an extremely difficult task, but that he was absolutely convinced that if he had to add to his already significant burden the Allegheny-Mohawk provisions, codified into law, there was no way that this could be done.

I think the committee found that statement quite persuasive.

Mr. MINETA. Let me go back to the question I asked earlier about the section 401 fitness. Do you have any problems with the way the CAB has administered the present law since the public convenience and necessity test was sunset?

Mr. IGNATIUS. I am not aware of any problems in that respect, Mr. Chairman.

Mr. MINETA. Also, with regard to, again, the organization of the international aviation functions, would we be putting too much power in the hands of an ALJ if that recommendation is not or cannot be tested by that senior career person, and questioned? Would that be too much power at that level?

Mr. IGNATIUS. First, it would be too much power with or without the senior career official absent the safeguards that we have carefully set forth at the top of page 10 of our statement. There are a number of things involving appeal and case history, any of a number of safeguards that we think must surround this decisionmaking process and which we set forth in my statement in detail.

As I say, I do not believe in our task force that we specifically addressed the question of a senior official in addition to the ALJ and the Secretary. But I would like Mr. Philion to comment because it is possible in one of the meetings something was discussed that I was not aware of.

Mr. PHILION. Mr. Chairman, as Mr. Ignatius has indicated, we did not, before we saw the DOT plan, develop into that kind of detail.

But during the course of these hearings and after we had a chance to review the DOT plan, we saw that one of the questions, one area of concern that you have expressed among others, is the question of insulation and tenure.

Reviewing our own concept, we then fortified our view that this step involving the senior career official is really not necessary and by not having it, you avoid the question raised by the issue of tenure and insulation.

In short, we believe that with the safeguards outlined in our concept, and the right to appeal, that the administrative law judge decision should be the one that we are dealing with at that point in time.

Last, of course, you would not have any political insulation or tenure questions with administrative law judges.

Mr. MINETA. I am quite sure that Judge Yoder would agree with you totally. [Laughter.]

Mr. PHILION. I was thinking of him in particular.

Mr. MINETA. Mr. Hammerschmidt.

Mr. HAMMERSCHMIDT. Thank you, Mr. Chairman.

Mr. Ignatius, I believe that your comprehensive testimony and the chairman's questions and your responses have pretty well covered this subject matter, but I might give you a chance to expand a little more on one subject matter of interest.

The Justice Department stated that it does have responsibility for passing on requests for antitrust immunity for a variety of industries, and it cited the Export Trade Company Act, the Newspaper Preservation Act, and the Defense Production Act as examples of this authority.

In light of this, why do you think that the Justice Department would not be able to fairly evaluate requests for antitrust immunity in the air transportation industry?

If I can be a little more colloquial, Justice is saying, "ATA, we hear what you are saying but we do it for all these other industries, Congress gave us the authority, why can we not do it for your industry?"

Mr. IGNATIUS. Those other authorities are quite explicit, it seems to me. With respect to the newspaper industry, I believe it is the so-called Failing Newspaper Act where it is possible under this authority to have two newspapers enter into operating agreements with respect to production particularly, in the event that one of those newspapers would otherwise fail.

In the Defense Production Act, there are certain provisions in support of the national defense that permit companies otherwise competing to meet where a substantial defense need can be determined.

So that it is possible, I think, Mr. Hammerschmidt, to make the case that you could handle the public benefits of transportation by lodging the authority in the Justice Department. We are not saying you could not put it there, and I certainly would not argue that they are unfair people. They are good public servants as we find in all areas.

What I am saying and want to repeat quickly is that there is a balance that is very important here in order to secure the benefits of this transportation system.

What we have I believe, Mr. Hammerschmidt, is a system that in effect provides a national network as the result of the individual effort of a number of private competing companies.

This has been achieved because it has been possible to grant immunity in a number of areas that otherwise would not take place were not this grant of immunity possible. We would feel much more comfortable if the decisionmaking were in the hands of people who were looking for transportation benefits rather than an agency whose institutional background and whose historic involvement has been in the administration of the antitrust laws.

Mr. HAMMERSCHMIDT. Thank you, sir.

I was reading American Airlines' testimony which will come before this committee, and I notice that they propose to repeal the authority in sections 412 and 414, the granting of antitrust immunity to industry agreements or, in the alternative, to impose a sunset date on this authority.

Evidently, American believes that the airline industry can survive without this authority and although their view is a minority one, I wonder if you would care to comment on it.

Mr. IGNATIUS. Yes; I would. American Airlines, like most of our member carriers, is blessed with outstanding professional people, and I think when their time comes, either in testimony or in the statement they have already prepared, they are competent to set forth clearly what their views are on this matter.

Mr. HAMMERSCHMIDT. Many interested parties have advocated that one agency, in this case the Department of Transportation, should receive all of the authority which will be transferred from the CAB at sunset.

They cite the advantages of one-stop shopping and the fact that DOT possesses the most expertise in air transportation matters.

In your opinion, what will be the disadvantages, if any, of putting all of CAB's current authority into DOT?

Mr. IGNATIUS. We think that it is not necessary to transfer all of CAB's authority to the Department of Transportation.

Second, we think in addition to it not being necessary, that it would tend to preserve the essence of much of the economic regulation of the industry that we no longer think is either appropriate or in some cases even possible, given the changes that have taken place since 1978. We would not want to see all this authority automatically transferred.

Mr. HAMMERSCHMIDT. You have advocated the adoption of an amendment to section 105 of the Federal Aviation Act, which deals with Federal preemption of State authority in air transportation.

One of the items you have mentioned will be a definition of the term "services," that is currently used in that section. Since that term is not currently defined under existing law, could you tell us what problems, if any, have arisen as a result of this term not having been specifically defined?

Mr. IGNATIUS. We are still working on this matter and I think the point I wanted to make with the committee is that this is a very inclusive word. Because it is broad, we need to make sure that it is broad where it needs to be, but that it does not cover more than should be covered.

In short, we just think there is a definitional need here and we would be happy to work with the committee on it in the coming days.

Mr. HAMMERSCHMIDT. Thank you, sir. Thank you, Mr. Chairman.

Mr. MINETA. Mr. Weber.

Mr. WEBER. No questions, Mr. Chairman.

Mr. MINETA. Mr. Wolf.

[No response.]

Mr. MINETA. Mr. Ignatius, yesterday, when Deputy Secretary Burnley was with us, representing the Department of Transportation, he stated that absent legislation it would not have the 404 authority to require nondiscriminatory treatment of the handicapped by the carriers, but that it would have the authority under section 504 to require airport operators as Federal grant recipients not only to make their own facilities accessible to the handicapped but also to make contracts with the carriers to require that the carriers do business at that airport in a way that does not discriminate against the handicapped.

In other words, the DOT seemed to be arguing that although it would not have the authority to regulate air carriers regarding transportation of the handicapped, it could force airport operators to regulate, I guess as a mini-CAB, where DOT itself did not have the authority.

I would like to get your comments on the DOT proposal.

Mr. IGNATIUS. I will be pleased to do that.

First, the question with respect to the carriage of handicapped people is an important one and I am glad that it has come up and I do want to address it.

Second, the use of the airport operator as a quasi-CAB to administer the performance of the airlines is something that I would hope Mr. Burnley would perhaps give a second thought to before he concludes that for all time that is the way the matter should be handled.

There are several points that I think are significant here.

First, there is continuing Federal authority in section 504 of the Rehabilitation Act which says in effect that recipients of Federal funds cannot discriminate against anyone involved in the benefits of this program if such a person is handicapped.

Now, that has some effect on us but really only limited effect because most of our carriers are not direct recipients of Federal funds.

The more likely continuing authority, Mr. Chairman, is the authority of the Federal Aviation Administration with respect to safety. Over the years, our carriers have developed a number of practices that take into account the special needs where they exist of handicapped people. The Federal Aviation Administration in connection with these matters has been, if you will, a reviewing authority to make sure that what we were proposing to do was compatible with the safety in operational requirements that are their area of responsibility.

That authority will continue and those practices, I assume, would continue.

But finally, quite apart from the question of Federal law and Federal authority is the experience over the years of the airlines in providing for special needs and circumstances where they exist. I do not think I have to spell out for knowledgeable people such as the members of this committee the many things of this kind that we do with respect to prior boarding; with respect to meals; with respect to any of a number of things.

In regard to the handicapped, the carriers have worked over the years on any of a number of programs. In fact, anyone who wants to know what their procedures are in this regard need only ask. They have them published for the use of either individuals or organizations who have an interest in this regard.

In summary, the use of the airport operators as the means of administering this program is something, I think, that raises more questions than it answers. There is continuing authority both in the Rehabilitation Act that applies in a limited way to us; there is broader authority in the FAA's responsibility, and there is the fine record of the airlines over the years.

Mr. Mineta. I believe that in its rulemaking, CAB answered the contention that FAA rules would be adequate. CAB pointed out that the primary purpose of the FAA rules on the handicapped is to insure that procedures for carrying the disabled and handicapped are safe.

The aim of the CAB rules is not simply to insure that the disabled are carried safely but also to insure that they face no unreasonable nonsafety related obstacles to travel.

Do you agree with the CAB's analysis?

Mr. **Ignatius**. Yes; I believe that sounds essentially correct.

Mr. **Mineta**. Well, Mr. Ignatius, Mr. Landry, Mr. Philion, thank you very much for your presence here and helping us along in this whole process. I appreciate it.

Mr. **Ignatius**. Thank you.

Mr. **Philion**. Thank you, Mr. Chairman.

Mr. **Mineta**. We have written testimony from two air carriers, Delta and American Airlines, which I will insert in the record at this time. There being no objection, it is so ordered.

[The statements of Delta and American Airlines follow:]

STATEMENT OF DELTA AIR LINES, INC., BEFORE THE SUBCOMMITTEE ON AVIATION OF THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION, U. S. HOUSE OF REPRESENTATIVES

March 14, 1983

This statement on behalf of Delta Air Lines supplements and expands upon the testimony given by the Air Transport Association of America. The statement addresses two main subjects--which federal office should in the future deal with competitive and consumer practice regulation, and the future disposition of Sections 412 (intercarrier agreements) and 414 (antitrust immunity) of the Federal Aviation Act.[1/]

I. SUMMARY OF POSITION

In this statement Delta urges the Subcommittee to consider a unique blend of measures which will insure an adequate level of

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[1/] Because this statement is limited to issues relating to CAB sunset, this statement does not address the Employee Protection Program established by Section 43(d) of the Deregulation Act. That program, according to regulations recently published by the Department of Labor, would require air carriers which were certificated prior to October 24, 1978 to grant a mandatory hiring preference to certain employees of competing airlines who have been furloughed or terminated for any reason other than for cause, including reasons not remotely related to deregulation. Delta and the overwhelming majority of other air carriers believe that this program, which imposes on the older airlines novel and extraordinary costs and regulatory burdens, has no place in a statute devoted to removing the heavy hand of regulation from carrier management and, therefore, that Section 43(d) should be repealed in its entirety. Delta would be pleased to submit more detailed comments with respect to Section 43(d) should the Committee feel that such comments would be helpful.

consumer and competitive practice regulation, minimize temptations and opportunities for future re-regulation of the airline industry, and provide for federal preemption of economic, consumer, and competitive practice regulation. The major aspects of Delta's approach are summarized as follows:

1. Airline competitive and consumer practice regulation should be lodged in the Federal Trade Commission. The Department of Transportation should not have any authority in this area. (If, for practical reasons, the DOT must be given some authority in this area such authority should be temporary and circumscribed.)

2. The CAB's consumer protection regulations and associated rulings in effect on December 31, 1984 in the areas of overbooking, baggage liability, no-smoking, incorporation by reference into the ticket of the conditions of carriage, charters, and computerized reservations sytems should be affirmatively transferred to the FTC.

3. The FTC should be authorized to adopt and enforce rules for the smoking of tobacco aboard airplanes.

4. Federal preemption with respect to economic, consumer, and competitve practice regulation should be continued and strengthened.

5. Special antitrust legislation should be enacted to permit the continuation of the travel agency and Area Settlement Plan programs.

6. Careful consideration should be given to whether Sections 412 and 414 are needed for domestic air transportation, and, if it is determined that they are needed, which agency should administer the provisions.

An explanation and amplification of the above approach are set forth in this statement.

II. FUTURE AIRLINE COMPETITIVE AND CONSUMER PRACTICE REGULATION

Delta's primary concern with possible CAB sunset-related legislation is to avoid sowing the seeds of future airline re-regulation--not just re-regulation of such economic matters as fares and routes, but also any regulation by federal, state or local entities which is more intrusive than, or dissimilar to, the regulation to which other deregulated industries are subject.

Let it be clear that Delta is not arguing for a termination of federal airline consumer regulation, although we might prefer that. As will be explained, Delta thinks most such regulation is unnecessary because market forces, commmon, good business sense, and the concern which most airlines have for their customers would insure more than adequate "consumer protection" for airline passengers and shippers. But Delta is also realistic enough to know that, at least during the transition to full deregulation, the federal government will desire to play a role in the area of airline competitive and consumer practices. Even more importantly, we are also mindful that most air carrier operations cross state boundaries, and therefore that the traveling public benefits from, and the airlines require, a certain degree of uniformity in competitive and consumer practice regulation that necessitates federal regulation _and_ _preemption_, just as the industry requires uniform nationwide, federal air traffic control and safety regulations.

Delta's legislative objective is to see that future competitive and consumer practice regulation is authorized and located within the federal government in a way that permits governmental involvement in these areas, while also: (a) preventing an undue expansion of consumer practice regulation, (b) providing for a desirable amount of consumer protection _uniformity_ by effectively preempting state and local regulation in that area, as well as with respect to economic regulation, and (c) foreclosing the possibility of significant re-regulation of any aspect of air transport operations. To these ends, Delta suggests that jurisdiction over competitive and consumer practices affirmatively be placed with the Federal Trade Commission, which would then regulate these matters for the airlines as it does for other industries, with existing CAB consumer regulations and associated rulings specifically to be transferred to that agency (and with suitable adjustments to be made in the FTC's organic statute). If this approach is deemed impossible or impractical at this time, and if our industry must be targeted for transitional, special competitive and consumer practice regulation by the Department of Transportation, then Congress should at least insure that the Department's authority in the area is carefully circumscribed and that such authority is scheduled for sunset in the near future, as soon as provision can be made for a more suitable, long-term solution.

Before outlining our specific proposals for implementing these suggestions, we would like to emphasize our industry's strong commitment to consumer satisfaction. Delta, for example, has always recognized that its interests are not only compatible with the highest regard for customers, but are vitally dependent upon consumer satisfaction and preference. Most carriers feel the same and act on that conviction. Even under the old economic regulation, when there was relatively little "consumer protection" initiative by the CAB or any other federal agency, various public opinion polls showed that the airlines consistently ranked at the very top among all industries in terms of consumer satisfaction, confidence, and value given for dollar paid (see, e.g., "The Study of American Opinion," U.S. News & World Report (1977); HEW Consumer News (1971); Aviation Daily, March 21, 1978, p. 118; and a Harris Survey used in The Continuing Public Mandate to Improve Inter-City Passenger Travel, Final Report, March 1978). The airlines' affirmative concern, even then, was shown by the fact that Delta (and other carriers) developed procedures to provide non-smoking accommodations in advance of the CAB's adoption of regulations in this area.

These basic service-oriented characteristics of the airline industry have been underscored and intensified since deregulation by the demands of free market forces--of air travelers. We are now even more clearly a service industry, and every airline which intends to be successful has no choice but to offer the optimum price and service options for its passengers. Under deregulation, this translates into marketplace-required consumer protections, since repeat business is the sine qua non of success.

Delta's "Ready When You Are" motto is symbolic of the highest possible regard that Delta has for each of its customers. We understand fully that other airlines will quickly claim our passengers and shippers if we are insensitive or unresponsive to their needs or desires. Other airlines view the competitive climate the same way--they have no choice under deregulation if they intend to remain in business. While Delta is a leader in customer satisfaction, we are aware that other airlines are striving in every way possible to improve their services and overtake us. This competitive climate has produced a high level of respect for consumers and integrity in our industry. As a consequence, the airlines are being driven by competitive forces, not the government, to address and resolve all reasonable passenger or shipper grievances.

This means that the same "free market forces" that Congress decided in 1978 would best serve the interests of consumers in such vital areas as route freedom and pricing will also insure that consumers are protected with respect to the handling of their baggage, booking practices, non-smoking accommodations, and the like.

Nevertheless, Delta recognizes that other "unregulated" businesses are subject to some federal oversight with respect to competitive and consumer practices, and we would expect the airlines to be accorded _similar_ governmental attention now that they are joining the ranks of the "unregulated." In order to accomplish this, Delta suggests that airline competitive and consumer practices should be regulated by a _single_ office of the federal government, and that such regulation should be by the FTC, as is the case with most other industries. Further, the Department of Transportation and all other agencies and departments of the federal government should be prohibited by Congress from also dealing with such matters. For example, if the FTC regulates the airlines, the DOT should not be allowed to establish a "consumer complaint" office as it now plans. Such fragmentation of governmental function is unnecessary and undesirable. (Conversely, should DOT be given jurisdiction in this area, the airlines' exemption from Section 5 of the Federal Trade Commission Act should not be repealed.)

There are a number of reasons why Delta prefers the FTC to the Department of Transportation in this area. First, the subject matter is a natural and logical one for the FTC, not the DOT. Most of the CAB regulations with which we are here concerned--those dealing with overbooking; liability for lost or damaged baggage; incorporation by reference into the ticket of an airline's conditions of carriage; consumer protection rules dealing with charter services; and the regulations which the CAB will likely adopt before sunset concerning computerized reservations systems--are grounded in major part on Section 411 of the Federal Aviation Act. (Smoking regulations present a special situation that will be addressed later.) The subject matter of Section 411 is essentially the same as that of Section 5 of the Federal Trade Commission Act. While the airlines are currently exempted from Section 5, that is only because of the present existence of Section 411 of the aviation statute and of the CAB.[2/]

Except for the airlines, and a few other special exceptions, Congress has for years designated the FTC as the primary federal regulator of competitive and consumer practices for U.S. business. Under this mandate, the FTC, an independent agency--an arm of the Congress--has developed extensive expertise in the area. The FTC is now the focus of the federal government's involvement in consumer protection. Although the FTC Act originally was designed primarily to promote and protect competition, as long ago as 1938 the reach of that Act was broadened to empower the FTC to protect the interests of consumers without proof of injurious effects upon competition. The Supreme Court has confirmed that the FTC has equal authority to deal with consumers as with competitors.[3/] In furtherance of its responsibilities, the FTC has established rules and guidelines in areas such as deceptive pricing to consumers, mail order merchandise, cooling off periods for door-to-door sales, and substantiation of advertising claims.

[2/] Because it was the desire of Congress in 1938 to repose comprehensive regulatory authority over many aspects of airline operation in a single agency--the new CAB--airlines were excluded from FTC Section 5 coverage and similar powers for the CAB were created in Section 411 of the Federal Aviation Act.

[3/] See, e.g., FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972).

Needless to say, the FTC has established mechanisms with which to deal with consumer protection and competitive practices, and these established mechanisms and procedures could be efficiently and easily used to protect airline consumers and air transpor- tation competition. Conversely, it must be realized that the Department of Transportation has no expertise and few mechanisms for dealing with consumer protection matters, and that the DOT would have to establish both if it were given authority in this area. The Department apparently does not desire to assume this new type of activity.

Logically, then, when the CAB sunsets at the end of 1984, the special exemption of the airlines from Section 5 of the FTC Act should be terminated and the airline industry should be subjected to FTC consumer and competitive practice regulation just like most other U.S. industries. No sound reason has been advanced for treating the airlines differently in this respect.

A second reason for giving this responsibility to FTC is the fact that, if this subject is not placed with that agency and were instead to be assigned to DOT, there would be a splintering of federal jurisdiction and activity concerning what is really a single subject matter--competitive and consumer regulation of businesses which are not subject to economic regulation. Such a fragmentation would produce inefficiencies, inconsistent government policies, and duplication, if not multiplication, of governmental bureaucracies.

Third, Delta is also concerned that if our industry is singled out from other unregulated businesses and DOT is given special jurisdiction over airline competitive and consumer practices, along with the other airline-related powers which may be transferred to the Department, the stage would be set for future re-regulation. As some members of this Subcommittee will recall, Delta has been a long and consistent opponent of re-regulation. That was our original concern in opposing deregulation (a fear that Congress would instead re-regulate); it has been our concern since 1978 in urging Congress to complete the major deregulation effort which it did make in 1978 as fully and expeditiously as possible, by sunsetting the CAB and by otherwise avoiding the creation of opportunities for re-regulation; and it is our concern now.

If competitive and consumer practice responsibilities are given to the Department of Transportation along with the other powers being suggested for transfer to that Department, virtually everything done by the CAB today could be done by DOT. For example, if broad and vague statutory language such as that in Sections 404(a) and 411 of the Federal Aviation Act were to be preserved for DOT implementation along with its other inherited powers, much more regulation could be attempted by the Department in the future than is now actually performed by the CAB, especially because the CAB has been a fairly consistent proponent of sunset. DOT could do this under the guise of "consumer protection" or through other forms of regulation. In short, if DOT were given competitive and consumer practice authority in addition to essential air service, international air transportation and other airline-related responsibilities, the Congress would simply be creating a "mini-CAB" within DOT, would be doing nothing to complete the de-regulation process and, to the contrary, would likely be interpreted as inviting future re-regulation.

Such a result could be expected because singling out the airline industry for competitive and consumer practice regulation by DOT would create a unique statutory mandate. These actions certainly could be interpreted by the Executive Branch as permission to subject the airline industry to different and more intensive regulation than that borne by other industries. The invitation to re-regulate in response to changing future political and special interest pressures would be real and dangerous, and likely would be accepted at some time in the future. We ask the Congress to avoid this possibility, and to chart a true path to a deregulated environment which is nonetheless consistent with adequate consumer protection, by assigning these responsibilities to the FTC.

Fourth, DOT in any event has no expertise with respect to, or mechanisms for, regulating airline competitive and consumer practices. Moreover, it is evident from the Department's testimony and presentations that the Department has no desire to enter these regulatory areas with which it is unfamiliar. Delta accepts the fact that the Department will have jurisdiction over the temporary essential air service program, and over international route and rate/fare matters. That may be necessary, but it is not necessary for the Department also to be vested with consumer and competitive practice responsibilities when an independent agency and an arm of the Congress--the FTC--with established expertise, is available for this purpose.

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Because it is not always easy to distinguish between "domestic" and "foreign" air transportation, Delta believes that the FTC should have the same degree of jurisdiction over foreign air transportation that it has over other foreign business activities. This would be consistent with the FTC's existing jurisdiction over various aspects of foreign commerce. Congress has carefully established the authority of the FTC to deal with unfair methods of competition involving commerce with foreign nations, and thus the FTC already has experience in this area. This experience would be valuable in dealing with foreign air transportation, and the defined powers of the FTC would eliminate any possibility that the FTC would impair relations with foreign governments or would issue rulings which would be in conflict with the authority of the Departments of Transportation and State over such air transportation.

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In order to make clear the FTC's initial responsibilities and scope of the FTC's jurisdiction; to avoid any hiatus in the CAB's present scheme of consumer regulation; and to underscore federal preemption, Delta recommends: (a) that the airlines' present exemption from Section 5 of the Federal Trade Commission Act specifically be repealed so that there is no question but that the FTC has jurisdiction over airline competitive and consumer practices, and (b) that the CAB's consumer regulations and related rulings in effect on December 31, 1984 (i.e., no-smoking, baggage liability, denied boarding compensation, incorporation by reference of the conditions of carriage, consumer protection rules dealing with charter services, and the regulations concerning computerized reservations services that will likely be adopted by the CAB) be transferred on that date to the FTC, to be implemented thereafter by that agency.

III. REGULATION OF NO-SMOKING ACCOMMODATIONS DOES NOT REQUIRE TRANSFER OF SECTION 404(a)

We fully recognize that lifting the air carriers' exemption from Section 5 of the Federal Trade Commission Act, without more, would not vest the FTC with jurisdiction over the CAB's no-smoking regulations, which are grounded not on Section 411 of the Federal Aviation Act, but on the provision of Section 404(a) which requires the air carriers to provide "adequate service."

Provision for regulation of no-smoking accommodations can be made, however, without transferring the "adequate service" language of Section 404(a) of the FAA. Indeed, Delta urges that the "adequate service" language not be transferred to any other agency or department, but be allowed to expire upon CAB sunset. The language was an intimate part of the old economic regulation, and formed the basis, for example, for orders specifying the quantity and quality of service--matters now explicitly to be governed by free market forces--as well as orders dealing with no-smoking accommodations. A continuation of that language, and a transfer of it to another agency or department, would be an implied invitation to economic re-regulation in unknown areas.

Instead, Delta urges the Congress to handle this matter by amending the Federal Trade Commission Act as narrowly as possible to add jurisdiction over smoking on board commercial aircraft. Suggested language is attached in Appendix A.

IV. NEED FOR FEDERAL PREEMPTION

Delta believes it essential that there be clear and unequivocal federal preemption not only with respect to the economic aspects of airline operation, but also concerning airline competitive and consumer practice regulation, and that FTC regulation provides a sound and rational basis for preemption in the latter area. The airline industry has a legitimate need for federal preemption. Unlike most other industries, airline operations rapidly traverse state boundaries. Air transporta- tion is provided over a national, interrelated network and in order for the network to function fully and adequately to serve all areas, it requires a certain degree of uniformity. This is true of competitive and consumer practice regulation, just as it is of rules for the air traffic control system and of safety matters. Both the public and the airlines would be unnecessarily confused and disadvantaged if the rules concerning baggage liability, overbooking, incorporation of conditions of contract, permissible and impermissible trade practices, and the like varied from locality to locality. Moreover, because federal preemption in this area would foreclose a multiplication of inconsistent consumer and competitive practice regulations, preemption would help create a climate favorable to increased competition and the functioning of free market forces. Finally, preemption would insure that the type of air transportation services which the public has come to expect and rely upon would continue in the deregulated climate, and that long-standing consumer protections would remain intact. For these reasons, Delta asks Congress to preempt in these areas, as well as with respect to economic regulation.

The Air Transport Association has proposed amendments to Sections 105 and 604 of the Federal Aviation Act which would strengthen preemption in all of these areas. Delta endorses those suggestions. But to leave no doubt about the matter, we believe that Congress should also transfer the existing CAB consumer regulations to FTC, as suggested above.

V. FEW AMENDMENTS ARE NEEDED TO THE FEDERAL AVIATION ACT

The Subcommittee will note that except for strengthening the preemption provisions, this statement has not yet suggested changes to the Federal Aviation or Airline Deregulation Acts. As this shows, very little Federal Aviation Act legislation is needed. On the other hand, legislation in other areas, such as the FTC Act, _is_ needed in order fully to complete the deregulation process. This approach, while involving simple and straightforward statutory changes, also would help contain any sunset-related amendments of the aviation statutes in a narrow focus, and therefore help avoid re-regulation.

VI. IF DOT MUST TEMPORARILY BE VESTED WITH COMPETITIVE AND CONSUMER PRACTICE RESPONSIBILITIES, ITS POWERS MUST BE SEVERELY CIRCUMSCRIBED AND SHORT-LIVED

Delta understands that while there are bills pending that deal with the FTC, none are currently under active consideration and, because this session of the Congress necessarily will be a short one, it may therefore be difficult to accomplish Delta's objectives this year. We ask the Subcommittee to try to do as we urge, but if these conditions are a temporary bar to vesting the FTC with jurisdiction over competitive and consumer practices, and the Subcommittee and Congress decide that for the time being, at least, jurisdiction over this subject should transfer to DOT instead, Delta asks that the jurisdiction be carefully circumscribed and that provision be made for early sunset so that a better long-term solution will have to be fashioned in the near future. Even though the current administration of the DOT does not appear to want regulatory authority over competitive and consumer practices, future DOT administrations may relish such power and may choose to combine it with other powers over airline operations in order to re-regulate.

Hence, Section 411 and most certainly 404(a) should not be transferred to DOT. Instead, those sections should be allowed to expire, and only as much new power should be created for DOT in this area as is necessary to continue the aforementioned CAB consumer regulations in existence for the time being (until the long-term solution is developed). We also ask the Subcommittee carefully to develop Report language to insure that as long as this new DOT authority exists, it is narrowly confined to implementing existing CAB regulations. We know of no pressure or need for new consumer regulations in other areas of airline operations, and therefore no justification for reposing any broader authority in DOT.

Delta further suggests that if this power must be assigned to the Executive Branch, even temporarily, the Subcommittee consider granting to Congress appropriate review and approval authority for all regulatory initiatives involving major new rules or significant changes in the CAB rules that are in effect on December 31, 1984. Such approval power would assure that any significant modifications to existing rules or creation of new regulatory schemes would reflect Congressional intent (the Congress may want to do this, of course, even if jurisdiction over airline competitive and consumer practices is transferred to FTC, as Delta urges).

VII. SECTIONS 412 AND 414 (INTERCARRIER AGREEMENTS AND ANTITRUST IMMUNITY)

While Delta understands the reasons for the Air Transport Association's suggestion that the aviation acts be amended to transfer Sections 412/414 to the Department of Transportation rather than the Department of Justice, there are other options with respect to domestic air transportation that should be considered and might be preferable. (DOT probably should have authority under these sections with respect to international air transportation, but even here Delta's non-opposition is premised on the assumption that any transfer of Sections 412/414 power to the Department of Transportation will not be used as a basis or an excuse for also giving DOT power under Section 411, under Section 404(a), or under any other provision of the Federal Aviation Act not currently scheduled to be transferred, with respect to either domestic or international air transportation.) These other approaches involve less need to amend the aviation statutes than does the ATA suggestion, and thus less opportunity for re-regulatory proposals.

One option would be to transfer jurisdiction under Sections 412/414 to DOT for international air transportation only, and terminate the sections altogether for domestic air transportation.

A second option would be to allow Sections 412/414 to transfer to the Department of Justice as now scheduled, and to permit DOJ and DOT to proceed with respect to international matters in accordance with the accommodation which they have already resolved. This option would leave both sections in existence for domestic as well as foreign air transportation, but to be administered by DOJ.

We suggest a consideration of these options because Delta sees little need left for Section 412 or 414 domestically, at least if Congress passes pending, special legislation with respect to the airline travel agency program and the related Area Settlement Plan. Domestically, there seem to be only three primary areas in which the carriers may need or desire to function pursuant to intercarrier agreements filed under Section 412 and which need antitrust immunity under Section 414: (a) the travel agency/Area Settlement Plan programs; (b) the airline scheduling committees, which are designed to allocate available navigable air space at high density airports; and (c) perhaps, the Scheduled Airline Ticket Office (SATO) program whereby airlines jointly operate ticketing offices at government locations. The airline scheduling committees currently are virtually worthless from a practical standpoint, and consequently there may be no real need to retain Sections 412 and 414 domestically with respect to them. The SATO program could more assuredly continue to function if it had statutory antitrust immunity, although the program probably could operate on a modified basis even in the absence of such immunization.

The travel agency/Area Settlement Plan programs, which are in the public interest, probably would need immunization from the antitrust laws if they are to continue without major change. But this could be handled by special antitrust legislation, such as the Export Trading Company Act of 1982 which was designed to increase the export of goods and services produced in the United States by providing alternative avenues of relief from the antitrust laws as they relate to export activities, and such as the legislation authored by Congress which exempts from the antitrust laws exclusive territorial licenses to manufacture, distribute, and sell certain soft drink products. Just as Congress determined that these two areas have unique attributes, a simple and justifiable determination could and should be made with respect to the existing travel agency system and the Area Settlement Plan. Special legislation concerning the travel agency industry already has been introduced into the Congress, with airline support. If the travel agency/Area Settlement Plan matters were handled in this manner, little need would exist for continuing domestic authority under Sections 412/414, except possibly on a standby basis at the Department of Justice.

VII. CONCLUSION

Under the overall approach outlined in this statement, the only changes needed to the aviation statutes would be in Sections 105 and 604 in order to strengthen federal preemption, and yet continued consumer protection would be assured. Opportunities for present statutory re-regulation would thereby be avoided, and temptations for future re-regulation by agency or departmental action would be severely, and appropriately, curtailed.

APPENDIX A TO
STATEMENT OF DELTA AIR LINES, INC., BEFORE THE SUBCOMMITTEE ON AVIATION OF THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION, U. S. HOUSE OF REPRESENTATIVES
March 14, 1984

Proposed Federal Trade Commission Act Amendments

1. Removal of air carrier exemption from Section 5 of FTC Act:

Section 5(a)(2) of the FTC Act would be amended by striking "air carriers and foreign air carriers subject to the Federal Aviation Act of 1958."

2. Vesting the FTC with authority to regulate no-smoking accommodations aboard aircraft:

Section 6 of the FTC Act would be amended by adding the following new subparagraph (i):

> "The Federal Trade Commission is empowered to adopt and enforce rules for the smoking of tobacco aboard commercial passenger aircraft."

3. Transfer of certain consumer protection regulations to the FTC

The following savings clause would be added to the FTC Act:

> "(a) All orders, determinations, rules, regulations, permits, contracts, certificates, licenses, privileges, and grants:
>
> (i) which either have been issued, made, granted or allowed to become effective by the Civil Aeronautics Board under Section 411 of the Federal Aviation Act of 1958, as amended (49 U.S.C. §1381) or which have been issued in 14 C.F.R., Parts 250, 252, 254 [the proposed computerized reservations systems regulations, and certain portions of Part 207], and

(ii) which are in effect at the time this Act takes effect,

shall continue in effect according to their terms and shall be adopted and enforced by the Federal Trade Commission until modified, terminated, repealed, superseded, set aside, or revoked in accordance with the law by the President, the Federal Trade Commission, any court of competent jurisdiction, or by operation of law.

"(b)(1) The provisions of this Act shall not affect any proceedings, including notices of proposed rulemaking, pending before the Civil Aeronautics Board on the effective date of the transfer under subsection (a), but such proceedings and applications, to the extent that they relate to matters transferred by this Act to the Federal Trade Commission, shall be continued. Orders shall be issued in such proceedings, appeals shall be taken therefrom, and payments shall be made pursuant to such orders, as if this Act had not been enacted; and orders issued in any such proceedings shall continue in effect until modified, terminated, superseded, or revoked by the Federal Trade Commission, by a court of competent jurisdiction, or by operation of law. Nothing in this subsection shall be deemed to prohibit the discontinuance or modification of any such proceeding under the same terms and conditions and to the same extent that such proceeding could have been discontinued or modified if this Act had not been enacted.

(2) The Federal Trade Commission is authorized to promulgate regulations providing for the orderly transfer of proceedings continued under Section (b)(1)."

STATEMENT OF AMERICAN AIRLINES, INC.

TO THE SUBCOMMITTEE ON AVIATION OF THE HOUSE PUBLIC WORKS AND TRANSPORTATION COMMITTEE

MARCH 13, 1984

American Airlines was an outspoken opponent of the proposals that eventually became law with the passage of the Airline Deregulation Act of 1978. American's opposition to that legislation was based upon its belief that airlines function most efficiently as quasi-public utilities, with entry limited and prices regulated.

That belief is now adademic. With free entry and free pricing having been the rule for several years, it is generally agreed that a return to public utility-type regulation of the airlines is no longer feasible.

Current Issues

All that is left to be done by Congress in this final year in the life of the Civil Aeronautics Board is to clean up a number of technical matters. In some instances, the statute does not adequately reflect what must have been the intention of Congress. The need to preempt state regulation is a good example.

In other instances, the statute has left some voids. An example is the question of whether certain ancillary regulatory functions of the Civil Aeronautics Board should survive sunset, and if so, which other federal agencies should assume them. .This statement will limit itself to addressing the latter question.

Tests to be Applied

American urges the committee to apply a two-step test to determine which CAB functions should be retained and which agency should assume them:

1. The marketplace test. The first is to make a judgment whether the marketplace, if allowed to function freely, will ensure that the public interest is served in areas now the subject of CAB regulation. If so, the CAB's regulatory jurisdiction should be allowed to lapse rather than be transferred to some other agency.
2. The general business regulation test. The second is to make a judgment as to whether regulations applicable to business in general will serve to protect the interests of the travelling public upon CAB sunset. If so, then specific airline regulation should be avoided in favor of general business regulation.

Unfair Trade Practices

Section 411 of the Federal Aviation Act, which gives the CAB powers to deal with unfair trade practices, was not specifically transferred to some other federal agency by the Airline Deregulation Act, nor was the language in the Federal Trade Commission Act exempting airlines from the jurisdiction of the FTC modified. Clearly, this is an area in which the marketplace cannot in all instances provide adequate protection in any industry. Thus the question is whether the prohibitions against unfair trade practices applicable to business in general will suffice for the airline industry. If so, then elimination of the airline exemption from the Federal Trade Commission Act is clearly the preferred course. Only if the FTC's jurisdiction is perceived as not suitable for the airline industry should Congress create and appropriate funds for a separate regulatory program within the Department of Transportation.

American is unaware of any contentions that the FTC has insufficient expertise to monitor competition in the airline industry or that the language of the statute it administers is deficient when applied to airlines. Indeed, the language of Section 411 was modeled after Section 5 of the Federal Trade

Commission Act. Those who would create a new regulatory scheme in DOT justify their position first by citing the dangers of state regulation. This concern, although a real one, is best answered by strengthening the federal preemption language in Section 105 of the Airline Deregulation Act, not by creating new layers of regulation.

A second justification is that airlines should not be subject to FTC jurisdiction for competitive practices in domestic air transportation while they are subject to DOT jurisdiction for those same practices in international transportation. It is less than clear how a split in jurisdiction would create real world problems. After all, domestic air transportation has been deregulated while international air transportation has not. In any case, it is essential that DOT's regulatory powers over domestic air transportation be limited to the minimum required by the public interest. If a split must be avoided, it is better to give international jurisdiction to the FTC rather than domestic jurisdiction to the DOT.

Indeed, until the dispute over computerized reservations systems arose in 1983, it was the unanimous industry position that FTC rather and DOT assume jurisdiction over airline competitive practices upon CAB sunset. The CRS dispute has led many airlines to conclude that they want more regulation rather than less when it comes to monitoring airline competitive practices, and that DOT is more likely to play an activist role than the FTC. This is nothing more than a call for partial reregulation of the airline industry, a step that Congress should staunchly resist.

Whatever one's view may be of the issues relating to computerized reservations systems, the fact of the matter is that the CAB, before year-end, will have in place a detailed rule applicable to this aspect of the airline distribution system. If jurisdiction over competitive practices is given to the FTC, the CAB's rule on computerized reservations systems will continue in place unless and until the FTC sees fit to change it.

Consumer Protection

The CAB's various consumer protection measures have not been based entirely on Section 411 of the Federal Aviation Act. Section 404(a) of the Federal Aviation Act gives the CAB jurisdiction to ensure that airlines provide safe and adequate service. Safety in air transportation is, of course, the primary responsibility of the Federal Aviation Administration, and the CAB quite properly has not involved itself in this area except for fitness determinations, which could just as well be made by the FAA prior to issuance of an air carrier operating certificate.

Adequacy of service is a concept that has its origins in the route franchise bestowed by a certificate of public convenience and necessity. If one has a route franchise which precludes others from serving the route, then one must provide service (i.e. flights) adequate to meet the public's demand for air transportation over that route. Of course, this point is no longer valid since no airline enjoys a domestic route franchise today.

The CAB's use of the "safe and adequate" service language as a foundation for a number of consumer protection rules, while a stretch of the statutory purpose, was nonetheless understandable in light of the airline exemption from jurisdiction of the Federal Trade Commission. Now that certificates of public convenience and necessity no longer represent route franchises, it is time to eliminate the airline exemption from the Federal Trade Commission Act and to repeal Section 404(a) of the Federal Aviation Act, allowing the FAA to assume responsibility for all aspects of safety, including carrier fitness.

Much of the CAB's consumer protection program can now be adequately handled by marketplace forces. This includes rules relating to baggage liability and smoking. To the extent that the marketplace proves inadequate, the FTC can be expected to step in. If for some reason FTC jurisdiction proves deficient, Congress can always revisit this issue when the extent of the deficiencies are known. It is premature at this point for Congress to allow itself to be talked into building up a DOT bureaucracy for the purpose of protecting consumers from airlines, or airlines from airlines. The marketplace, augmented by the FTC's powers over business in general, should be given a chance to function. Most airline managements, long characterized as hot-house flowers before deregulation, have now become hardened to competitive realities. Some have become downright weeds! The power of the marketplace, and the response of airline managements to that power, should not be sold short by Congress in this final effort to implement the principles of deregulation.

Agreements and Anti-trust Immunity

The industry position on Sections 412 and 414 of the Federal Aviation Act (which permit industry agreements in certain circumstances to be given immunity from the anti-trust laws) has long been to transfer these functions to the DOT upon CAB sunset rather than to the DOJ. Since these provisions involve airline programs, and are not applicable to business in general, it seemed appropriate that an airline-oriented agency administer them.

Recent events, however, have led American to question whether Sections 412 and 414 should be retained at all. Other service industries are able to survive and prosper without them; why can't the airlines? Until recently, the airline answer was that Sections 412 and 414 couldn't hurt anything and might prove useful in preserving things such as the post-PATCO scheduling committees and the exclusivity feature of the travel agency program. It is now apparent that scheduling committees should not in fact survive CAB sunset. So long as there are scheduling committees, the FAA will be tempted to perpetrate some form of "slot controls" at the nation's busy airports rather than augment the capacity of the airways system to accommodate the traffic peaks that result when airlines schedule their flights to meet the demands of the public.

The status of the travel agency program will apparently be resolved by specific legislation relating to the CAB's decision in the Competitive Marketing Investigation.

As a result, it is time for Congress to rethink whether Sections 412 and 414 should be retained at all beyond January 1, 1985. If they are to be retained, they should be subject to a sunset date and should be administered by an agency that is both unrelated to the Federal Aviation Administration and expert in anti-trust concepts. American's view is that on balance it is preferable for Sections 412 and 414 to be repealed without further ado. If they are to be retained for a limited duration, they can best be administered by the Department of Justice. DOT's jurisdiction over economic aspects of air transportation should be minimized, not augmented.

Respectfully submitted,

AMERICAN AIRLINES

By ____________________
Gene E. Overbeck
Senior Vice President

Mr. MINETA. At this time, I would like to call forward Mr. Richard Mathias, senior vice president, government affairs, Pan American World Airways who comes accompanied by a number of others on a panel.

Mr. Mathias, please proceed and introduce your colleagues.

TESTIMONY OF RICHARD MATHIAS, SENIOR VICE PRESIDENT, GOVERNMENT AFFAIRS, PAN AMERICAN WORLD AIRWAYS, ACCOMPANIED BY JIM KOLSTAAD, FRONTIER AIRLINES; BILL OAKES, REPUBLIC AIRLINES; AND RANDY MALIN OF USAIR

Mr. MATHIAS. Thank you, Mr. Chairman, members of the committee. Thank you for the opportunity to appear here today.

I am Richard Mathias, PanAm. I am accompanied by Jim Kolstaad of Frontier Airlines;, Bill Oakes of Republic Airlines, and Randy Malin of USAir

In addition to the four carriers on this panel, 12 other airlines, Air Atlanta, Air California, Air Florida, Alaska, Eastern Airlines, Empire, Muse Air, Ozark, PSA, Piedmont, Southwest, and Western Airlines all join in the statement I am about to present. Many of these carriers are also represented here today and have asked me to tell you that they do join in support of this statement.

We have asked to appear today because there are two issues related to CAB sunset which we believe are of unusual importance and do require legislative action. While we support the proposed legislative changes offered by the ATA, we have asked to appear separately to be sure the committee is fully aware of our strong views on these issues and the definite need for some bill.

Let me emphasize at the outset that we are not here to support any kind of reregulation or any increase in current regulation, or to raise any matters which are not directly related to CAB sunset.

Our position is that whatever else the committee does this year, first priority must be to adopt legislation dealing with the unresolved issues of CAB sunset. Other issues, however important, should not be allowed to encumber that legislation or interfere with that purpose. Indeed, we believe that the legislation should be fairly limited and straightforward, and clean.

There are several sunset related issues, both technical and substantive, which need to be addressed and which have been discussed by other witnesses. The ATA and individual carriers will be covering some of these. Our focus today is on two issues which we consider to be of primary importance.

First is the question of the future of section 411 of the Federal Aviation Act. Second is the question of what agency should have jurisdiction over sections 412 and 414 of the act.

Our views in a nutshell are: (1) Section 411 should be continued in effect for domestic air transportation and responsibility for administering it should be lodged in the Department of Transportation, and (2) jurisdiction over sections 412 and 414 should be lodged in the Department of Transportation [DOT] rather than the Department of Justice.

Now, turning first to the issue of section 411. As you well know, section 411 prohibits unfair or deceptive practices and unfair methods of competition in air transportation. The Airline Deregulation

Act now provides that the functions of the CAB with respect to foreign air transportation, including its section 411 duties, will transfer to DOT upon CAB sunset. However, there is no similar provision with respect to section 411 as it pertains to domestic transportation.

Now, section 411 is the foundation for much of the CAB's existing consumer protection regulations. Under the sunset provisions passengers in foreign air transportation would continue to be subject to such protection, but other passengers would not. This would lead to the confusing and anomalous result that on the domestic leg of an international flight some passengers might have the benefit of protections which others—those moving only between domestic points—would not.

It would be difficult for the public to understand why Congress would want to concentrate certain kinds of consumer protection—such as denied boarding compensation, baggage liability, et cetera—on services where foreign citizen travel is predominant, but not on flights used more heavily by U.S. citizens.

A second and even more compelling reason for continuation of section 411 has to do with the regulation of the computer reservations systems and other competitive abuses. When the Deregulation Act was passed in 1978, Congress wisely directed the CAB to act to prevent predatory and anticompetitive practices and to guard against unreasonable industry concentration, excessive market domination, and monopoly power.

Back at that time few Members of Congress, few Government officials—or even most airline officials—had a sense of how the industry's reservations and ticketing procedures would change. They have changed dramatically since then.

The recent investigation of the Department of Justice and the CAB's current rulemaking proceeding, have revealed some very serious anticompetitive practices which threaten the competitive vitality of the airline industry. The CAB's proposed rule also recognizes the need for continuing oversight of reservations systems' practices.

I will not attempt to cover in my testimony all the various forms these anticompetitive practices take. The committee has compiled an impressive record on this subject in its own hearings last year. The evidence compiled by this committee and by the CAB and Justice Department makes clear that this is an extremely serious problem. As long as so much of the airline reservations and ticketing is done through computer systems owned by the largest airlines, there will be an ongoing need to protect smaller airlines against the enormous opportunities for anticompetitive abuse that ownership of these systems presents. However, unless action is taken by Congress this session, there will be no way after December 31, 1984 to enforce the rules which the CAB is now developing.

Equally important, there will not be an adequate forum to assess in the future the impact of the serious anticompetitive practices which are bound to evolve from the continued ownership of the two dominant computer reservations systems by the two largest airlines. Half of the Nation's airline tickets are sold through these two computer reservations systems.

Given the anticompetitive potential that it presents and given the objective of deregulation—the promotion of competition—it is unthinkable that Congress would leave this matter unattended and neglected after CAB sunset.

As you know, some have suggested that the problem will be addressed after sunset by some mysterious automatic vesting of section 411 responsibility in the Federal Trade Commission. Section 5 of the Federal Trade Commission Act is similar to section 411. But that section specifically excludes "air carriers and foreign air carriers subject to the Federal Aviation Act of 1958."

It is contrary to commonsense to argue that this exception would automatically terminate on CAB sunset. The Federal Aviation Act does not expire upon the sunset of the CAB. All carriers will continue to be subject to it in one fashion or another. Moreover, there is a serious question whether the FTC could engage in rulemaking with respect to competitive practices even if the agency had section 5 jurisdiction. The Magnuson-Moss Act does not give the FTC the same clear power in this area of competitive practices as it does with respect to consumer protection.

In any case, we oppose a legislative transfer of section 411 responsibility to FTC. There were good reasons in the original Federal Aviation Act for vesting consumer protection and competitive practice regulations in an agency dealing specifically with air transportation. Many of those reasons still exist.

While domestic air transportation is becoming much more like other unregulated industries, there are still significant differences. There are no other industries where the competitors sell each other's product, transfer customers to each other, and often lease each other's facilities or perform various other services for one another as they do in the airline industry.

Nor is there any other industry where so much of the product is sold through a system of common agents, based on an industry agreement. This web of interline and agency relationships has served the public well. Hopefully, it will be permitted to continue to do so. But it does give rise to unique issues affecting the public interest. The CAB's computer reservations case is a clear example.

There are computer reservation issues involving foreign, as well as domestic, air transportation. The same is true with respect to many other issues that arise under section 411. We need expertise somewhere in the Government to deal with these subjects. But we do not need it in two places. We will have it at DOT with respect to foreign. It logically belongs there with respect to domestic, too.

FTC jurisdiction is also unacceptable because its proceedings take too long to resolve issues like those involved in computer-reservations cases. The FTC's traditional trial-type procedures often are lengthy and cumbersome, as illustrated by the agency's investigation of the Official Airline Guide. That investigation took 4 years and the FTC's final action was ultimately set aside in the court.

The FTC's nonadjudicatory trade-practice proceedings are often even longer. For example, the funeral industry rules were first suggested by the FTC in 1972 but did not become effective until January 1, 1984.

While the DOT would have the same rulemaking, and adjudication options, and responsibilities, it would not be burdened with the cumbersome rulemaking procedures to which the FTC is subject.

It is also worth noting that while the CAB proceedings have not always been models of expedition, the Board's CRS investigation has been in existence for less than 1 year and proposed rules have already been issued.

It makes better sense to consolidate decisionmaking authority over air transportation in DOT. DOT will have an airline consumer protection staff of its own and will have section 411 jurisdiction over international air service, and jurisdiction over domestic air transportation in such areas of continuing regulation as essential air services, airspace control, and airport access.

Rather than scattering authority over air transportation among agencies and creating the potential for overlapping and conflicting policies, we urge Congress to consolidate and streamline the future jurisdiction.

I am turning to the issue of sections 412 and 414. Section 412 of the act provides a process and set of standards for approval of air carrier agreements, and section 414 authorizes the grant of antitrust immunity for approved agreements. These sections, taken together, provide the basis for much of the cooperative action among the airlines.

The public benefits stemming from this part of the statute are significant. In domestic air transportation, the airlines have developed agreements, called air traffic conference resolutions, which enable dozens of carriers and their agents to sell, carry, and transfer passengers, baggage, and freight, using standardized procedures for ticketing, handling, appointment of the agents, and settling of accounts. A similar set of carrier agreements ties together the scores of international airlines into an integrated worldwide system of safe, convenient, and responsible services.

The continuation of these agreement systems is important to the success of deregulation. They enhance rather than impede competition. They have helped to create a truly national air transportation system. The programs enable a new carrier, or an established airline which wants to expand its competition, to enter new markets with instant ability to interline effectively with almost all other airlines, to sell its tickets through some 23,000 travel agency outlets, and to settle its accounts in a nationwide settlement plan. The same procompetitive opportunities are offered by the international program of agreements.

Congress provided for sections 412 and 414 to survive CAB sunset for both domestic and international air service. As the law now reads, responsibility for these sections will be transferred to the Department of Justice. We feel strongly that such responsibility should go instead to the Department of Transportation.

The policy factors here are essentially the same as those related to section 411 involving unfair trade practices. First, we want jurisdiction consolidated in one agency. Decisionmaking authority should be streamlined, not spread out all over the landscape.

Second, the DOT because of its primary role in air transportation, will be better equipped to weigh and balance the transportation needs in deciding whether to approve or withdraw approval from an agreement.

Addressing the first point, the need to consolidate jurisdiction, we repeat our grave concern about multiheaded regulation, conflicting regulatory attitudes among agencies, overlapping responsibilities, duplicative staffs and, in the end, decisions being made by interagency committees. To scatter the centralized authority of the CAB among several executive branch departments—DOT, DOJ, FTC, et cetera—will hardly achieve the objective of less regulation or less intrusion by Government.

The danger of overlapping and conflicting authority is particularly serious in the area of international agreements, although it applies to domestic issues as well. DOT will have broad and direct regulatory authority over international air transportation, that is going to continue. Multilateral carrier agreements, involving some antitrust concerns, are fundamental to the international system. The agreements often are considered by foreign counterparts to DOT to be vital elements of a coordinated air transport system. We want the decision authority consolidated in one U.S. agency and this naturally points to DOT.

The second reason is that DOT will be better equipped than the Justice Department's Antitrust Division to decide whether the various airline agreements should be approved and protected from collateral attack by antitrust lawsuits. This will be the case regardless of which individuals might from time to time hold positions at DOT or DOJ, or which political parties may control the administration.

The Department of Transportation will have primary authority over international air services and also that remaining domestic regulatory authority, such as essential air services. In addition, through the FAA's authority to control access to domestic airspace, DOT will continue to be involved in the development of domestic air transportation.

These responsibilities will require DOT to be more aware than DOJ of the air transport system's operations, its competitive structure, and benefits to consumers of various airline cooperative programs. In our view, the basic issues presented under sections 412 and 414 are not traditional antitrust legal questions but, instead, questions of whether immunity for a proposed agreement is justified by the transportation benefits it promises.

In our view, the Department of Transportation is better equipped to make that analysis than is the Department of Justice. For sure DOJ, as it has in the past, can participate and make its views known on the merits of any particular agreement.

Finally, Mr. Chairman, I am authorized to state that those carriers joining me in this statement agree that there is a need for stronger language on Federal preemption. We fully endorse the testimony of the ATA on this subject.

That concludes my prepared remarks. I and my fellow panel members will, of course, be happy to try to answer any questions you have.

Thank you very much.

Mr. Mineta. Thank you very much, Mr. Mathias. One reason you provide for giving all section 411 authority to the Department of Transportation is that DOT will have this authority for foreign air transportation, and it does not make sense to give another agency authority for domestic transportation. I fully agree with your position.

When we raised the problem of divided jurisdiction with Secretary Dole, her response was that if we felt that one agency should have all consumer authority, then that agency should be the FTC.

Do you agree with that proposal?

Mr. MATHIAS. No, Mr. Chairman, I strongly disagree. Speaking for PanAm particularly, the idea of the Department of Transportation having primary, direct, and very pervasive authority over international air transportation in general, as it will continue after CAB sunset, but transferring section 411 jurisdiction involving competitive practices over to the FTC, again creates a new type of separation of authority, conflicting regulation. Rather than solving the problem, it just adds to it.

Mr. MINETA. What about: "Oh, that is really not a problem because we will just get a memorandum of understanding and even though it is a split jurisdiction, we will be able to take care of it in that manner"?

Mr. MATHIAS. Well, it does not work with memoranda of understanding, as you well know, Mr. Chairman, and as we have found out in very painful experience over the past number of years in the international air transportation area. Multiheaded jurisdiction lodged in the Department of Transportation, CAB, Department of Justice, and the Department of State, is one of the most serious issues we face in doing business—conflicting policies, decisions made by interagency committees, rapid shifts and backs and starts in aviation negotiations and policy in general all result from the Government unwisely placing jurisdiction over the same issues in multiple agencies.

Mr. MINETA. When we asked Deputy Secretary Burnley why DOT thought that FTC would get jurisdiction under section 5 of the FTC Act when section 5 expressly exempts air carriers subject to the Federal Aviation Act, his response, as I understand it, was that the congressional intent in section 5 was to remove FTC jurisdiction over unfair competitive practices only so long as CAB had comparable jurisdiction. Therefore, regardless of the language of section 5, when CAB loses jurisdiction over section 411, FTC would automatically gain that jurisdiction.

What are your views of DOT's legal analysis on this issue?

Mr. MATHIAS. Of course, I have to be charitable. My view is that the legal position is inadequate. It would be a logical theory it only it were supported by some legislative history or by the plain meaning of the statute, and it is not supported by either.

Mr. MINETA. Your recommendations are that DOT get CAB's sections 411 and 412 authority. This would mean that most of what CAB does would be transferred to DOT.

In its testimony, DOT argued that this would be inappropriate because it would not be a real sunsetting of CAB, and because having all aviation responsibilities in one agency would create the temptation for reregulation.

Do you think that DOT's concerns are valid?

Mr. MATHIAS. I cannot assess perhaps as well as Mr. Burnley what the tendencies at DOT might be. But I can tell from the organizational structure which we are urging, we think there would be less regulation in some by concentrating what authority there is in one place than there would be by having the same total sum of authority but spreading it among several agencies. Each of them would develop staffs, rules, approaches, policies, to impose their views and their regulatory jurisdiction over the air carriers.

Mr. MINETA. I am wondering, did any of the members of the panel attend the meetings at which the Department of Justice discussed their plans for administering sections 412 and 414 after sunset? If so, what points did the Department of Justice make at those meetings and why did you not find them persuasive? Any of the panel members. Mr. Malin?

Mr. MALIN. Mr. Chairman, I did not attend. USAir did have representation there.

I think the major concerns we had were the very strong position that was presented to us that we could not look for the Department of Justice to grant continuing antitrust immunity to some programs that we think are very important to us, namely the Air Traffic Conference and the area settlement plan.

For the reasons that have been expressed earlier, both by Mr. Mathias and Mr. Ignatius, we strongly prefer having the organization reviewing antitrust immunity be one that will have the expertise to consider the public benefit from the transportation side, rather than having primary focus on antitrust violations.

Mr. MINETA. Mr. Oakes.

Mr. OAKES. I share Mr. Malin's view. I did not attend the meeting but we did have representation there. That is my understanding.

Mr. MINETA. Mr. Kolstaad.

Mr. KOLSTAAD. The same.

Mr. MATHIAS. Mr. Chairman, I did attend the meetings and also had separate meetings with officials of the Department of Justice and the Department of Transportation on this issue.

I would endorse what was just said by Mr. Malin and the remarks made by Mr. Ignatius earlier this morning, from ATA. Our concerns are not allayed. I wish to emphasize to the committee that this is not a position the carriers have based on particular personalities that may now be in office, either at DOT or DOJ. I do not think it is a question of short-term shopping for the most sympathetic audience.

What we are talking about here is not what particular decision might be made in the next several months after sunset happened, but the long-range plans for the next 4, 8, to 12 years.

We are looking at this from the point of view of how you set up the future Government or regulation of the airlines, and it is critical to us from the experience we do have over the past 20 years, involving CAB cases where the Department of Justice and Department of Transportation have all been involved in a regular basis, that the Department of Transportation—like the CAB itself—is better able to weigh in the balance the public benefits, the consumer benefits, and the competition benefits from these cooperative carrier agreements than is the Department of Justice, which tends to take a much more narrow and limited view of the public interest. That is primarily technical and legal antitrust considerations.

Mr. MINETA. Mr. Malin.

Mr. MALIN. Mr. Chairman, it is obviously possible for honorable men and women to disagree on subjects such as Mr. Burnley's comment that the FTC can assume section 411 authority.

We have been assured by a number of people, I think both at Justice and at the CAB, that we have nothing to worry about with the ATC and the ASP agreements.

As you would expect, we have also asked the same question of our own outside antitrust counsel, and we get a differing viewpoint. I think most airlines, certainly USAir, has been advised that there are real antitrust concerns about continuing those programs without the protective cloak of antitrust immunity.

Mr. MINETA. Now, with respect to the need for preservation of section 411 to deal with anticompetitive practices, your testimony concentrates on problems with the computer reservations system.

Do you think that section 411 may be needed to deal with other types of anticompetitive practices?

Mr. MATHIAS. Yes, indeed; the computer reservations system is the most important and widespread current area of potential predatory conduct and that, of course, is the focus of our immediate concern.

But clearly, 411 has in the past and, indeed, will in the future almost certainly form the statutary basis for other types of unfair and competitive practices which affect not only the smaller carriers but also affect directly consumer interests.

Mr. MINETA. Mr. Hammerschmidt.

Mr. HAMMERSCHMIDT. Thank you, Mr. Chairman.

Mr. Mathias, as you know, CAB recently ordered the issuance of proposed rules relating to computer reservations systems. Although the comment period is still ongoing, can you tell us your position about the proposals as drafted?

Mr. MATHIAS. Well, we support the proposals as drafted. I will not go into all the details, I am sure you are familiar with them as well.

We strongly support the CAB action. We have some suggestions about how they might be even expanded further. In that regard, I would not be speaking necessarily for all of the 16 carriers that are appearing jointly here to present the written statement addressed to sections 411, 412, and 414.

But I would be glad to supply for the record additional material on that on behalf of PanAm.

[The following was received from Mr. Mathias:]

PanAm supports the Board's rules to regulate the conduct of computer reservation system (CRS) owners that lease their equipment and provide training to independent travel agents. The Board's rules should prevent the worst abuses and free the travel agency computer displays of the bias that has characterized them to date.

PanAm is not optimistic that these rules can eliminate the likelihood that the largest CRS owners will abuse their monopoly position to:

(1) Charge an excessive and unfair price for the privilege of appearing in their respective reservation systems. (The Board has proposed a rule to control pricing abuse as well, but we fear that it will be difficult to enforce and will provide many opportunities for evasion.)

(2) Use market information generated by the systems to design and execute plans that will be used to damage their non-CRS owning competitors.

In summary, PanAm supports the Board's rules but recognizes that only structural relief, that is, action to separate ownership of the travel agent reservations systems from the air carriers that now control them, can preserve competition and insure that individual travelers get a fair choice of air services.

Mr. **HAMMERSCHMIDT**. You favor the transfer of section 411 to the Department of Transportation as it applies to domestic air transportation. One of the reasons you gave for supporting this position is that if this authority is transferred to FTC, that agency would be bogged down in cumbersome rulemaking procedures required by the Magnuson-Moss Act.

If this jurisdiction was transferred to FTC, would you support exempting consumer-oriented rules in the airline industry from the Magnuson-Moss Act in favor of informal rulemaking procedures used by most other agencies?

Mr. **MATHIAS**. Mr. Hammerschmidt, I would have to take a more detailed look at what types of issues would be addressed in one procedural fashion and which would be addressed in another, and supply something for you as a supplemental statement on that.

[The following was received from Mr. Mathias:]

Since the airlines have not been included within the jurisdiction of the FTC, I am not directly familiar with FTC procedures. However, our review of its industry-wide rulemakings does demonstrate that its procedures are ponderous and that it takes the Agency many years to reach a final rule after it has issued a Notice of Proposed Rulemaking (NPRM). (For example, the three oldest FTC rulemaking proceedings have been pending for nearly nine years: the FTC's Credit Practices NPRM, 40 FR 16347, was issued in April 1975 and the final disposition was not published until March 1, 1984; the Hearing Aid rule NPRM, 40 FR 26646, was issued in June 1975 and there has been no final disposition; the Health Spa rule NPRM, 40 FR 34615, was issued in August 1975 and there has been no final disposition.)

I have described elsewhere in my testimony the reasons why the Congress should place regulatory jurisdiction over the airline industry in the Department of Transportation and not the FTC. However, if the decision were made to give jurisdiction over airline industry trade practices to the FTC, Pan Am would ask that the Congress give that agency explicit authority to control the abuses by the computer reservations system owners by regulation and instructions to issue a final rule by a certain date. A final rule prohibiting display bias on computer reservations' screens that did not issue until six years after the Notice of Proposed Rulemaking would be at least five years too late.

An airline industry exemption from the Magnuson-Moss Act's procedural requirements that permitted the FTC to use the usual informal rulemaking procedure of the Administrative Procedure Act, 5 U.S.C. 553, would not be sufficient to insure timely relief. The FTC is apparently committed to the use of the lengthy Magnuson-Moss type procedures even when the Magnuson-Moss requirements do not apply. It is my understanding that, in the only instance recently where the FTC had the opportunity to use informal procedures in a non-Magnuson-Moss rulemaking, the Standards and Certification rule, it chose to retain the Magnuson-Moss procedures. While the circumstances there were unusual, that decision bodes ill for those in the airline industry who need quick action, particularly where the agency is not familiar with the issues involved.

The airline industry is unique and requires enlightened and expert regulators who are familiar with the history of the industry. The Department of Transportation had long-standing, if partial, responsibility for airline regulation and will also have the complete responsibility for regulating international routes, rates, consumer and trade practices after CAB sunset. Consolidating the regulation of domestic trade and consumer practices in DOT as well would be both sensible and efficient.

Mr. **HAMMERSCHMIDT**. I realize fully that you oppose it going to the FTC, but if it went there and that was the other option, what sort of relief would you suggest from cumbersome rulemaking procedures.

Mr. Mathias. Well, you would have to make some major changes in how they operate over there if you are going to expect any kind of efficient and effective regulations that are comparable even to what we have had in the past. They are just not, from our limited experience, secondhand information based on people who have been directly involved in FTC proceedings, we would necessarily have to expect cumbersome, inefficient, long term and also a form of regulation which might be encumbered not just by procedural problems but serious conflicts within the Trade Commission with respect to policy orientation.

Mr. Hammerschmidt. Well there, too, we would accept any extension of your remarks you would like to make for the record, Mr. Mathias.

Mr. Mathias. Mr. Kolstaad would like to make a supplemental statement on that.

Mr. Hammerschmidt. Yes, Mr. Kolstaad.

Mr. Kolstaad. This is not directly relevant. But one of the reasons that we strongly support transfer of 411 to DOT rather than FTC relates to the comments that were filed by the FTC in the CRS investigation.

Those simply did not build our confidence in the fact that FTC will exert the kind of watchdog view over the rules that are finally adopted by the CAB this fall.

Mr. Hammerschmidt. Thank you, sir.

I am sorry, Mr. Malin.

Mr. Malin. Again perhaps a followup comment on both of your concerns. One of the statements, I believe, the CAB has made in their rulemaking on the CRS is that they believe there is a need for continuing oversight of the whole CRS issue. In other words, this is not the final decision for all time. The whole CRS field is still in a developmental stage. It has come a long way in the last 8 years, who knows where it is going in the next 5 years.

So, CAB recognizes that somebody is going to need to look out for what is going on in the CRS field over the next few years.

Again, USAir has very little expertise or experience with the FTC, but relying on other people to inform us about how they operate, it is our belief that they just do not involve themselves in competition-based issues. While they are certainly concerned with consumer protection which is one part of the 411 concern, that as far as issuing rules and regulations regarding unfair methods of competition, this is just not a field that they have much interest in and perhaps even have the authority to deal in.

So, for that reason, USAir strongly urges the 411 authority to be at the DOT.

Mr. Hammerschmidt. Thank you, Mr. Malin. Mr. Oakes, did you have a comment?

Mr. Oakes. I will certainly echo those comments by USAir. It is our position that those rules will need to be reviewed not only on a continuing basis in the immediate future but even out further into the future when the computer world, as we know it today, may be so enhanced in the next 5 to 10 years that we will be dealing with matters that we do not even understand today.

We feel very strongly that there needs to be an area of expertise in this area that is willing to continue the review of those CRS's.

Mr. HAMMERSCHMIDT. Thank you.

When this committee considered early sunset legislation last Congress, the airlines supported the continuation of antitrust immunity authority for intercarrier agreements, but at the same time indicated that it would be appropriate if this authority were to expire a few years after sunset.

Although your testimony is silent on this issue, do the airlines you represent today favor imposing an expiration date on the Federal Government's authority to grant antitrust authority to carrier agreements?

Mr. MATHIAS. I believe, Mr. Hammerschmidt, that we do not see an early possible termination date to the carrier agreements as being a desirable thing. We are hoping that all the carriers in the industry who have developed this very successful set of interline and agency, and area settlement bank programs, will continue to participate and support those programs for the indefinite future—not only for the benefit of the carriers but for the benefit of the traveling public and the shippers.

We envision that in the course of another 2 or 3 years those agreements would either terminate, fall apart, or lapse as a result of no longer having the necessary Government approval.

Mr. HAMMERSCHMIDT. I am sure you understood, but for the record, my question referred to domestic air transportation only, of course.

Mr. MATHIAS. Well, my answer, I think, would be the same. I am pretty sure I would speak for the other members of our group on that.

Mr. HAMMERSCHMIDT. Thank you.

In discussing consumer issues, your testimony relates solely to section 411, although part of CAB's current consumer authority stems from section 404 of the Federal Aviation Act which, of course, requires carriers to provide safe and adequate service.

As you know, this provision has allowed the CAB to act in the areas of smoking and in the transportation of handicapped passengers. Should this section 404 authority be transferred to DOT along with the authority under section 411?

Mr. MATHIAS. Well, we have not taken a position on the section 404. We concentrated on the fundamental point that section 411 must be transferred. That provides not only the basis for the computer reservation rules but also most of the CAB's consumer protection regulations involving denied boarding compensation, baggage liability limitation, charter rules, all the issues that would be involved in the consumer fraud area.

Section 404 has had much more limited applicability. I think the smoking rules and the handicapped rules are the only ones that come to my mind and the only ones you mentioned.

We do not have a joint statement with respect to that. I speak certainly for PanAm. We have no objection if the committee feels that continuation of authority in that area would also be desirable as providing a statutory basis for rules on the handicapped.

Frankly, I have not done any extensive analysis of whether the handicapped rules could survive absent a transfer of section 404 authority. It has been my understanding that they are primarily based—but perhaps not exclusively—on the separate statute that was mentioned this morning, the Rehabilitation Act.

If it is necessary to maintain rules with respect to the handicapped and the current rules we have not found to be burdensome, then we would certainly not oppose the transfer of section 404 authority.

Mr. HAMMERSCHMIDT. Thank you very much. Thank you, Mr. Chairman.

Mr. MINETA. Mr. Weber.

Mr. WEBER. Thank you, Mr. Chairman.

First of all, I would like to extend a special greeting to Mr. Oakes who is representing a good Minnesota airline here. I just want to point out to you that I was scheduled to meet with the president of Republic Airlines a couple of weeks ago. He was an hour late because his plane was not on time. He claims he was flying Northwest—I do not buy it. [Laughter.]

Mr. Mathias, I would like to just ask a few questions that relate to the impact of computer reservations, the computer reservations system on international operators.

First of all, as I understand it, PanAm is, are they not, the largest American international carrier?

Mr. MATHIAS. Yes; we are the largest U.S. flying international carrier.

Mr. WEBER. Passengerwise. Can you describe for us some of the difficulties that PanAm has had with the computer reservations system internationally?

Mr. MATHIAS. Yes. I will not go into great detail. In this particular matter, of course, I would be making remarks only on behalf of PanAm.

Mr. WEBER. I understand.

Mr. MATHIAS. I do wish Northwest were here today to join me. I imagine that they may do so in the future.

The computer reservations problem, as you well know, is basically one of bias in the display whereby not all carrier schedules are shown in a straightforward, equitable fashion based on either the same degree of convenience or the chronological order as you would find it, for example, in the printed addition of the Official Airline Guide.

That same problem applies in the international area as well as domestic—not only with respect to PanAm, Northwest, and TWA's schedules being shown in the domestic U.S. computer reservations systems but also bias against our schedules in the computer reservations systems in certain foreign countries. Probably the most significant problem area is the German system called START, for short, in which there is built in a degree of bias against the schedules of PanAm, Northwest, and TWA which is far worse than the situation involving the domestic U.S. reservations systems, although the problem there is also serious.

I will supply information to you on our problems in that area, and I think that there is potentially a tie-in with the rulemaking authority that we would hope the DOT would exercise in the future under section 411 if that is transferred to them. So that this would be a clear example of a place where the DOT would be exercising jurisdiction both over domestic computer reservations rules and being able to cross-transfer their expertise and knowledge in that area with the authority that they will have under CAB sunset anyway over computer reservations problems in the international field.

Mr. WEBER. When we talk about this problem I am reminded of a controversy that we had in Minnesota a few years ago over the question of ballot placement during an election. We did some extensive studies and determined that having your name first on the ballot was a significant enough advantage so that we now require ballot rotation in Minnesota, as we do in other States.

I realize the choice of an airline is a much more important choice to most people than who they vote for for Congress. [Laughter.]

I think that probably the same principle applies.

You will discuss some of your analysis of the Lufthansa system and the problems it creates for us?

Mr. MATHIAS. Yes.

Mr. WEBER. The CAB does concede this problem, do they not?

Mr. MATHIAS. Yes; I believe they are generally aware of the problem. We hope to persuade them and the other areas of the U.S. agencies of the U.S. Government that have this overlapping jurisdiction in the area now to help us remedy the problem.

Mr. WEBER. To date, what is the recommended CAB response?

Mr. MATHIAS. Well, the proposed rules on the computer reservations systems that the Board has put out do not deal directly with this problem, in spite of the fact that Northwest and TWA and we have asked them to attempt to get at the problem immediately.

Mr. WEBER. Mr. Malin.

Mr. MALIN. Just to add one thought. The Board has provided that if an owner of a CRS system is discriminated against, then it could take action. For instance, if PanAm had its own computer reservations system in the marketplace and Lufthansa discriminated against PanAm and its system, then it would be fair under the CAB's proposal for PanAm to do the same.

But they have not made a provision for an American to go after Lufthansa, an American system because PanAm is not being treated fairly.

Mr. WEBER. So if I understand it, that recommended response benefits really only United and American; right?

Mr. MATHIAS. It benefits only the people that have the computer reservations systems already and therefore have the power not to need the CAB rule.

Mr. MALIN. It does benefit TWA who also, of course, is one of the owners of CRS systems.

Mr. WEBER. Briefly, does PanAm or the group have recommendations beyond that for how we ought to deal with this, specific recommendations?

Mr. MATHIAS. Well, we may be able to present to you a legislative proposal for your consideration as part of the supplemental material that I will provide to you, and it is possible that Northwest and TWA may decide to join in that particular presentation, too.

Mr. WEBER. I take it you are more or less of like mind with the other airlines you just mentioned on this subject?

Mr. MATHIAS. Excuse me?

Mr. **Weber**. I take it that you are more or less of a like mind with TWA and Northwest on this subject?

Mr. **Mathias**. I think we are all very concerned about this particular issue, yes. I have talked with them—not about a legislative proposal—but I have talked to them about the fundamental problem many times, including recently.

Mr. **Weber**. I have no further questions, Mr. Chairman.

Mr. **Mineta**. Well, Mr. Mathias, Mr. Kolstaad, Mr. Malin, and Mr. Oakes, the subcommittee appreciates very much your being here and your testimony will be of help to us.

Thank you very much.

Mr. **Mathias**. Thank you for having us.

Mr. **Malin**. Thank you.

Mr. **Oakes**. Thank you.

Mr. **Mineta**. I would now like to call on Mr. Gordon H. Mansfield, national advocacy director, Paralyzed Veterans of America.

Mr. Mansfield, your statement will be made a part of the record at this point.

[Statement referred to follows:]

Statement of Gordon H. Mansfield, National Advocacy Director, Paralyzed Veterans of America

Mr. Chairman, and Members of the Subcommittee, it is a pleasure for Paralyzed Veterans of America to appear today and present the views and concerns of its members regarding airline transportation for the handicapped. I am Gordon H. Mansfield, National Advocacy Director of Paralyzed Veterans of America.

PVA is a Congressionally chartered veterans' service organization with over 11,000 members, all of whom have served in the United States Armed Forces and have incurred spinal cord injury or disease, both service-connected and nonservice-connected in origin. All of PVA's members are handicapped within the meaning of Section 504 of the Rehabilitation Act of 1973, as amended.

Mr. Chairman, PVA has historically addressed the issues of accessibility and maximum independence for our members and all disabled citizens. We are particularly pleased that this hearing is being conducted today, for transportation is one of the paramount aspects of an accessible, integrated society. For many years, PVA has been actively involved in addressing the transportation needs of America's disabled citizens.

It has been the experience of PVA that this Nation has been slow in responding to the accessibility requirements of the Nation's disabled citizens. This has been true in the removal of barriers, both architectural and attitudinal. During the past decade, however, there has been an increasing awareness of these needs. This awareness has, unfortunately, been sporadic and piecemeal with attention frequently directed at isolated or local problems and situations.

In our efforts to ensure that adequate and equitable travel resources are available to disabled individuals, PVA has worked with a wide range of organizations and agencies, both private and governmental. In all these actions, PVA has consistently stressed the need for a comprehensive, integrated approach in addressing the needs of the disabled traveler.

During the past year PVA attended conferences conducted by the Department of Commerce, Division of Tourism, has met with staff on the Air Transport Association, and has continued as an active participant in the Access to the Skies program conducted by Rehabilitation International, USA. In all these instances, specific aspects of travel for disabled individuals have been addressed and several conclusions have become evident.

The first factor which is most evident for any disabled traveler is the lack of continuity in available services. The disabled traveler is continually faced with unexpected obstacles. Examples of such obstacles are so numerous as to be the norm. An example of the lack of continuity or uniformity regards air travel. The disabled traveler has, generally, learned from experience that it is prudent to contact the air carrier prior to departure and notify them that the traveler has a disabling condition. This is due in part to the diversity of requirements and procedures established by individual air carriers. The disabled traveler upon arrival at the airport finds that, despite his previous contact with the carrier, the procedures are interpreted differently by the personnel working at the time. The traveler must then undergo changes in plans, acrimonious discussions, or accept demeaning treatment. This situation can be exacerbated when differing interpretations are made from airport to airport by the same carrier or even person to person within the same airport.

PVA is greatly concerned that with the sunsetting of CAB regulations what little enforcement authority which now exists will completely disappear. The potential situation is analogous to that which recently occurred regarding telecommunications. In the haste of deciding divestiture requirements on the Bell Telephone System the judicial system overlooked the provision of service to handicapped consumers. Also, the Congress despite passage of the Telecommunications for the Disabled Act was unable to foresee the regulatory wasteland where no effective remedy is available. The Federal Communications Commission has been tasked with creating regulations which would obligate the American Telephone and Telegraph company and the operating companies to provide services which they have been unable to fulfill. This impasse exists because the needs of the disabled were not considered prior to divestiture.

PVA believes this Subcommittee has the opportunity to examine the situation as regards airline travel by handicapped individuals and provide legislation to provide for specific enforcement by a designated agency with the proper authority and capability. We are specifically concerned that enforcement of Section 504 regulations be placed within one designated agency. At present, it is uncertain that an individual would be able to bring a private action against any airline. Also, it is equally unclear whether existing Civil Aeronautics Board Section 404 consumer protection regulations would allow an individual to bring the same action for enforcement under that authority. The uncertainty of what parts of CAB Section 404 would be placed in which agency upon sunsetting of the CAB is of paramount concern.

PVA believes the Congress should examine the alternatives available for sure and knowledgeable enforcement of regulations providing for equal access to air travel by handicapped individuals. For example, the FAA now has responsibility for enforcing Section 504 regulations at our Nation's airports. This agency has a group of employees and a structure for dealing with the special needs of handicapped individuals. Alternatively, it may be determined that the Federal Trade Commission has the people that the processes which could adequately handle these issues.

PVA urges this Subcommittee to make a determination of the need and to ensure that a specific agency is designated to enforce equal access to air travel for handicapped individuals. This agency should have clear responsibility and sufficient authority to carry out a well defined mission.

A second factor which confronts any disabled traveler is the limitation of available accommodations, dining opportunities, and recreational facilities. While these are part of the larger problem of architectural barriers in society they do pose a serious limitation for options available to the disabled traveler. PVA recognizes that the government cannot mandate accessibility in the private sector; however, we believe that it should be encouraged.

The establishment of uniformity in travel procedures and the removal of physical barriers will greatly enhance the ease of movement for all disabled individuals. Of particular importance are the implications of such actions for the disabled business traveler. The disabled business traveler frequently lacks the luxury of extra time to plan far in advance.

As more and more disabled individuals enter the work-force in jobs of responsibility and independence, the requirements for uniformly accessible transportation and facilities increase. The very livelihood of the disabled worker may depend on adequate transportation. Like any other business person, the disabled business traveler must have access to a readily usable network of transportation services. It is PVA's firm conviction that the needs of the disabled business traveler, as well as the disabled tourist, must be met if this Nation is to be truly accessible.

Mr. Chairman, on behalf of the members of Paralyzed Veterans of America and all disabled citizens we welcome this hearing. It is essential that the problems of the disabled traveler be addressed and hearings such as this greatly assist in focusing attention on this multifaceted issue. Hopefully, this will be the beginning of efforts to create a uniform, comprehensive approach to the needs of disabled individuals.

Again, thank you and this concludes my statement. I will be happy to address any questions that I can.

Mr. MINETA. Please proceed.

TESTIMONY OF GORDON H. MANSFIELD, NATIONAL ADVOCACY DIRECTOR, PARALYZED VETERANS OF AMERICA, ACCOMPANIED BY PAT HUGHES, INTERN, WASHINGTON CENTER FOR INTERNS

Mr. MANSFIELD. Thank you, Mr. Chairman. I will summarize some of the highlights of my testimony, and also introduce Mr. Pat Hughes who is with me today.

Pat is an intern from Seton Hall University who is with the Washington Center for Interns, and he is working this semester with PVA and learning a little bit about how our Government works.

Mr. MINETA. Very good. Great to have you here, Mr. Hughes.

Go ahead, Mr. Mansfield.

Mr. MANSFIELD. Thank you, Mr. Chairman.

PVA is a congressionally chartered veterans' service organization with over 11,000 members, all of whom have served in the Armed Forces and have incurred spinal cord injury. All of our members are handicapped within the meaning of section 504 of the Rehabilitation Act of 1973, as amended.

We, at PVA, have historically addressed the issues of accessibility and maximum independence for our members and for all disabled citizens. We are especially pleased that this hearing is being conducted today, for transportation is one of the paramount aspects of an accessible, integrated society. However, it has been the experience of PVA that this Nation has been slow in responding to the accessibility requirements of the Nation's disabled citizens.

This has been true in the removal of barriers, both architectural and attitudinal. During the past decade, however, there has been an increasing awareness of these needs. This awareness has, unfortunately, been sporadic and piecemeal with attention frequently directed at isolated or local problems and situations.

In our efforts to insure that adequate and equitable travel resources are available to disabled individuals, PVA has worked with a wide range of organizations and agencies, both private and Governmental. In all of these actions, we have consistently stressed the need for a comprehensive, integrated approach in addressing the needs of the disabled traveler.

During the past year, for example, we have attended conferences conducted by the Department of Commerce, Division of Tourism, have met with the staff of the Air Transport Association, and have continued as an active participant in the Access to the Skies program conducted by Rehabilitation International, USA. In all of these instances, specific aspects of travel for disabled individuals have been addressed and several conclusions have become evident.

PVA is greatly concerned that with the sunsetting of CAB regulations, what little enforcement authority which now exists will completely disappear. This potential situation is analogous to that which recently occurred regarding telecommunications.

In the haste of deciding divestiture requirements on the Bell Telephone System, the judicial branch of our Government overlooked the provision of services to handicapped consumers. Also, the Congress despite passage of the Telecommunications for the

Disabled Act, was unable to foresee the regulatory wasteland where no effective remedy is currently available.

The Federal Communications Commission has been tasked with creating regulations which would obligate the American Telephone & Telegraph Co. and the operating companies to provide services which they have been unable to fulfill. This impasse exists because the needs of the disabled were not considered prior to divestiture.

Mr. Chairman, this brings us straight to the point where we believe this subcommittee has a unique opportunity to examine the situation as regards airline travel by handicapped individuals and provide legislation which will enable specific enforcement by a designated agency with the proper authority and capability.

We are specifically concerned that enforcement of section 504 regulations be placed within one designated agency. At present, it is uncertain that an individual would be able to bring a private action under this authority against any airline. Also, it is equally unclear whether existing CAB section 404—consumer protection regulations—would allow adequate protection for that same individual. The uncertainty of what parts of CAB section 404 would be placed in which agency upon sunsetting of the CAB is of paramount concern.

We believe this subcommittee should examine the alternatives available for sure and knowledgeable enforcement of regulations providing for equal access to air travel by handicapped individuals. For example, the FAA now has responsibility for enforcing section 504 regulations at our Nation's airports. This agency has a group of employees and a structure for dealing with the special needs of handicapped individuals. Alternatively, it may be determined that the Federal Trade Commission has the people and the processes which could adequately handle these issues.

However, PVA urges that this subcommittee make a determination of the need and insure that a specific agency is designated to enforce equal access to air travel for handicapped individuals. Whatever agency is chosen should have clear responsibility and sufficient authority to carry out that well-defined mission.

That, basically, Mr. Chairman, is the thrust of my testimony. We are concerned that with the sunsetting of section 404 of the CAB it would not be transferred in total to one specific agency or it would disappear completely.

We are also concerned that section 504 regulations should have one agency, knowledgeable about the issue and the problems of handicapped individuals so that they can adequatetely address the issues.

I might point out that we are also concerned and perhaps it might be part of this subcommittee's work, that currently section 504 only applies—at least in CAB's view—to a limited segment of our air carriers. That, specifically, are those which are so-called commuter airlines.

Mr. **Mineta**. Mr. Mansfield, let me thank you very much for your comprehensive testimony.

As I understand the present situation, the CAB now has two basic regulations regarding the handicapped, both prohibiting discrimination against the handicapped in air travel. First, there are rather detailed regulations under section 504 of the Rehabilitation

Act, and those regulations apply only to carriers receiving essential air service subsidy.

Second, there is a broader prohibition against such discrimination by all carriers under section 404 of the Federal Aviation Act. Is that your understanding?

Mr. **Mansfield.** Yes, sir, Mr. Chairman.

Mr. **Mineta.** Now, if there is no further legislation, section 404 authority, in effect, disappears and except for essential air service subsidized carriers all Federal regulations prohibiting discrimination against the handicapped in air transportation would disappear as well. Is that correct?

Mr. **Mansfield.** That is my understanding, Mr. Chairman.

Mr. **Mineta.** It seems to me, then, that the issue here is not whether the existing regulations regarding the handicapped are adequate or not or could be improved or not, but whether all authority for any regulations at all on the handicapped in air transportation should be allowed to disappear.

Absent legislation preserving section 404, no agency of the U.S. Government will have the authority to bar discrimination against the handicapped, beginning January 1 on any carrier except an EAS subsidy recipient.

Is that something we should keep from happening by preserving section 404?

Mr. **Mansfield.** Mr. Chairman, that is the thrust of my testimony. We are in the position that when CAB sunsets, any existing protections disappear except for those limited 504 protections which in effect apply to airlines that cannot even transport, for example, disabled people in wheelchairs right now anyway.

We feel the need for a specific agency with the knowledge of problems disabled people face, and special needs and circumstances, to be tasked with specific regulations to enforce.

Mr. **Mineta.** Now, what in your view is air travel likely to be like for the handicapped if no Federal agency has the authority to bar discrimination against the handicapped by most air carriers?

Mr. **Mansfield.** Mr. Chairman, I would like to point out that right now we have heard individuals from specific airlines and also the Air Transport Association testify. As I indicated in my prepared testimony and also my remarks, we have made efforts to meet with these individuals. We are pleased that many airlines have policies that allow for the transportation of handicapped individuals on their fleets.

We are also pleased that the Air Transport Association staff are working with us on ways in which we can perhaps improve this.

But for example, PVA was concerned enough about the existing CAB regulations that we went into court last year and argued some specific issues before the court. We do not want to bring that up now, but just to point out the fact that we were that concerned about what the existing regulations, which only applied to a few airlines, are. We were concerned enough that we felt we had to bring that to the attention to the courts, and we are waiting for a decision.

So, I would suggest to the committee that there is a great need for some specific legislation to provide one agency and also give them some guidelines on exactly what they should enforce.

We are pleased that the airlines are making efforts but we believe they could make more efforts. We believe that with the knowledge that an agency was in the background ready to handle specific complaints, they might even go a little bit farther.

Mr. MINETA. If there were no regulation and no recourse to an agency with the authority to regulate, do you believe that the marketplace clout of the handicapped community would be adequate to ensure equal treatment from air carriers?

Mr. MANSFIELD. No, Mr. Chairman. The short answer to that question is simply, "No." I do not think the marketplace would be able to take care of this specific problem.

The reason I say that is because when we are talking about the handicapped here, we have Paralized Veterans of America presented ably, but there are a number of differing handicaps and each one of those—for example, people with hearing impairments, or sight impairments, or mobility impairments—they each have different needs. There is a requirement that all of these different needs be addressed.

Mr. MINETA. Yesterday, the Department of Transportation argued that although absent legislation it would not have the section 404 authority to require nondiscriminatory treatment of the handicapped by the carriers, it would have the authority, under section 504 of the Rehabilitation Act, to require airport operators, as Federal grant recipients, not only to make their own facilities accessible to the handicapped but also to force the carriers who do business with that airport not to discriminate against the handicapped.

In other words, the DOT seemed to be arguing that although it would not have the authority to regulate air carriers regarding transportation of the handicapped, it could force airport operators to regulate where DOT itself did not have the authority.

Could DOT actually achieve regulation of the air carriers via this route, in your opinion, and would there be a clear regulator to whom a handicapped person with a complaint could turn when he or she had a problem?

Mr. MANSFIELD. Again, Mr. Chairman, I believe the short answer is, "No." I believe that we should have one office designated within DOT to be responsible, how they in effect carry out their local or regional authorities, you know, perhaps this system could come into play there.

I do not believe putting the burden on each individual airport is going to solve the problem. We have enough problems now, as I have indicated in my testimony. The big problem we have is in inconsistency in application of existing rules, depending upon what city you are in and what airline you are flying on and even what shift is working that airline's counters or airplanes that day. They have different knowledge or beliefs about what they should be doing or should not be doing.

Mr. MINETA. I would like to recognize now our very distinguished colleague from Arkansas who also serves as the ranking Republican on the Veterans' Affairs Committee.

Mr. Hammerschmidt.

Mr. HAMMERSCHMIDT. Thank you, Mr. Chairman.

Gordon, we appreciate you being over here today. We are used to seeing Mr. Mansfield over at the Veterans' Affairs Committee quite often, and we are delighted that you brought Mr. Hughes with you to the witness table.

We appreciate your testimony.

Mr. **Mansfield**. Thank you, Mr. Hammerschmidt.

Mr. **Hammerschmidt**. You mentioned that you had been in some lawsuits, or a lawsuit, at least. Evidently, the PVA does not feel that FAA has been responsive enough in enforcing section 504 regulations at our Nation's airports; is that a correct assumption?

Mr. **Mansfield**. The lawsuit I referred to specifically, sir, is against the CAB.

Mr. **Hammerschmidt**. Against the CAB.

Mr. **Mansfield**. Yes, sir. I think we have found that as far as the FAA is concerned with the ground facilities, that there has been more of an improvement in accessibility. That, I think, is because of the fact that they deal with the actual facilities on the ground and that there is no question that Federal financial funds are involved in the construction.

We have had some concern and we have had to followup with specific complaints and followed them either through the agency or through other action.

But I think most airports in general are accessible.

Mr. **Hammerschmidt**. Well, you made reference to a number of unexpected obstacles which adversely affect the disabled air traveler. Would you like to expand on that?

Mr. **Mansfield**. There I was referring again, sir, to dealing with the airlines, for example, with making reservations and being required to have up to a 48-hour advance notice requirement if you are in a wheelchair, if there is specific additional equipment. Getting to the airport and dealing with the people at the reservations counter when you pick up your ticket, as to whether you might or might not be able to board the aircraft on that specific day with the wheelchair.

This is specifically with regard to electric wheelchairs, wheelchairs powered by electric batteries.

Getting on and off the aircraft as far as through the boarding gate; getting the wheelchair on the aircraft as a piece of baggage and hoping that it is going to be wherever you wind up at the end, where you can get the wheelchair back and move out.

Again, not so much specifically with FAA.

Mr. **Hammerschmidt**. So, I take it that those are obstacles which constitute lack of service or inconsistencies of service rather than physical barriers that you are speaking of.

Mr. **Mansfield**. Yes, sir, that is basically the problem.

Mr. **Hammerschmidt**. Thank you, Mr. Chairman.

Thank you, Gordon, very much.

Mr. **Mineta**. Mr. Mansfield, let me again thank you very much for being here. Mr. Hughes, you are with a fine organization, and I hope you are gaining a lot of experience while you are doing your internship there.

Thank you very much for being with us.

Mr. **Mansfield**. Thank you, Mr. Chairman.

Mr. MINETA. At this time I would like to call forward Mr. John F. Banzhaf, the executive director of Action on Smoking and Health, and Ms. Elizabeth Fayad, the associate director on the Coalition on Smoking on Health, on behalf of the American Cancer Society, the American Heart Association, and the American Lung Association.

At this time I would like to place into the record the statement by our colleague from Florida, Mr. Bill Young, who wishes to express his concern about protecting the health of nonsmokers after the sunset of the CAB.

Without objection, it will be made a part of the record at this point.

[The statement of Hon. C.W. Bill Young follows:]

STATEMENT OF CONGRESSMAN C.W. BILL YOUNG

Mr. Chairman and members of the subcommittee. I appreciate the opportunity to come before you and express my concern about protecting the health of nonsmokers beyond the sunset of the Civil Aeronautics Board (CAB).

On January 1, 1985, the CAB will expire and unless legislation is passed, its consumer health protection responsibilities will die with it. Because I continue to believe that the nonsmokers of America have rights, too, I have reintroduced my legislation, H.R. 4955, the Nonsmoker Relief Act. This measure would require the Department of Transportation to prescribe regulations for the separate seating of nonsmokers aboard planes, trains and buses traveling in interstate commerce. I have also cosponsored legislation (H.R. 4395) which would codify existing CAB regulations and airline practices governing the protection of nonsmokers' health and safety aboard commercial aircraft. Both measures attempt to continue the role our government has played in ensuring the basic right to clean air on airlines and all forms of public transportation.

I understand that some administration officials support leaving these consumer health protection functions to the marketplace, instead of placing them within a federal department or agency. I oppose that decision and feel that while the airlines have made great strides, it was not without some pushing and prodding from Congress. I further believe that without strong governmental protections, Americans will continue to fear the potential for policy changes that could curtail or even eliminate the protections they enjoy today. It is the responsibility of this government to make sure that the next breath we take is not filled with smoke. I support these measures and urge my colleagues on this Subcommittee to include similar language that would continue to protect the basic right not to smoke in any legislation transfering the authority of the CAB.

Mr. MINETA. Mr. Banzhaf, the full text of your prepared statement will appear in the record at this point.

[Statement referred to follows:]

STATEMENT OF JOHN F. BANZHAF III, EXECUTIVE DIRECTOR OF ASH

My message to the Committee is a very simple one: "Please don't make us fly the friendly skies of United, or of Eastern, American, or any of the other major carriers without protection against the well-documented problems of smoking." For nonsmokers—and especially for the estimated 30 to 40 million Americans who have a particular susceptibility to tobacco smoke, those skies aren't very friendly. Indeed, there is ample evidence from many different sources that without an agency responsible for protecting passengers with regard to smoking, there will be numerous problems—not only for nonsmoking pasengers, but also for the airlines in the form of conflicting state and local legislation, and law suits under a variety of theories.

My name is John Banzhaf, and I am Executive Director of Action on Smoking and Health, commonly known as "ASH." ASH is a national nonprofit scientific and educational organization which in 1969 first filed a petition seeking separate no-smoking sections aboard commercial aircraft. Since that time we have been forced to go back again and again before the CAB to ask them to tighten up the rules protecting the majority of passengers who are nonsmokers. We have been involved in most of the enforcement activity concerning this problem through the filing and prosecution of complaints before the CAB, and we have been involved in a number of lawsuits seeking to protect nonsmoking passengers. In short, we are the organization most directly involved with this matter, and the one with the most experience concerning the problems nonsmoking passengers suffer as a result as a result of smoking.

ASH believes that is is vital for the Congress to adopt legislation to insure that the consumer protection authority and rules of the CAB continue unimpeded and without interruption after the agency sunsets. If such general legislation is adopted, we certainly see no reason why smoking should not be included. Indeed, we believe that the need to assure protection related to smoking is even more important than other consumer areas for two reasons. The first is that it is the only consumer problem which related directly to consumer health and safety; all of the others relate only to economic loss. The second is that although some of the functions of the CAB under Section 411 may be picked up by the FTC, it is clear that without new legislation consumer protection against the problems of smoking would be discontinued—and passengers would be left to the not-so-tender mercies of the individual carriers.

It has been argued that even without an agency to enforce compliance, the airlines would continue to provide adequate protection based upon simple market demand. This argument is demonstrably false, and many different types of evidence clearly establish that a central regulatory authority is necessary. Let me very briefly outline this evidence.

First, every major action the airlines have taken to protect nonsmokers has been forced upon them by the CAB; in no case have the major carriers gone one step beyond what was minimally required by law. Thus, for example, airlines did not even provide separate no-smoking sections until it became clear that the CAB would order it. Most refused to provide any protection for passengers who found the initial small sections full, until the CAB clarified its rules to require such sections to be expanded as necessary. Airlines did virtually nothing about problems such as cigar and pipe smoking, drifting tobacco smoke, and the need for adequate ventilation until ordered to do so by the CAB. In short, the airlines have not shown a history of responding to demonstrated need, but rather of resisting it until ordered by a federal agency. There is no evidence that they have yet changed their tune.

Indeed, every recent indication is to the contrary. The CAB heard testimony only last month of a recent incident in which a young mother and her infant son were forced to be seated in the last row of the no-smoking section. The smoke from three passengers immediately behind engulfed them, causing both mother and infant to suffer asthmatic attacks. Yet the smokers refused to refrain, and the airline did nothing. Their physician reported this to the CAB, because the victims were still too sick to travel. And this is not an isolated instance. Consider the following: a man who had just recovered from a triple-bypass heart operation was forced to stand in the aisle on the entire trip across the Atlantic because the smoke drifting to his seat was too much for him; in an earlier CAB proceeding a physician testified about a patient who had to be taken to the hospital in an ambulance from the airport because smoke exposure on a brief flight caused her such significant breathing difficulty, and a couple had their vacation ruined when the wife had to be admitted to a hospital as a result of cigarette smoke she was exposed to on their flight.

Some violations were systematic. For some time Pan Am decided to seat smokers across the aisle from nonsmokers, causing a gigantic increase in complaints as the smoke drifted across the aisle. TWA and several smaller carriers decided to increase revenues by locating a no-smoking section sandwiched between two smoking sections in the same cabin. In both cases the offending configurations were only discontinued when the CAB threatened enforcement proceedings. Even more recently there have been hundreds of complaints, not only from passengers, but also from normally young and healthy flight attendants who have complained of dizziness, headaches, lightheadedness, etc. as a result of exposure to smoke. The complaints generated a Senate hearing, but the airlines have yet to take any corrective action.

The airlines' lack of concern and appreciation about the problems of smoking are also amply illustrated in the areas in which they are not currently regulated. The airlines' own statistics indicate that approximately 70% of their passengers prefer to be seated away from smokers. This is consistent with surveys which show that approximately 65% of all adults are nonsmokers, and that the percentage of nonsmokers tends to increase with increased education and income. Yet when these same passengers are seated in departure lounges, most of the carriers provide no protection—not even a rudimentary effort to post signs setting aside a small no-smoking section. Do the airlines really believe that the desire to be seated away from smokers only occurs above 30,000 feet, or is this another simple example of how the airlines decline to respond to nonsmokers' requests where they are not specifically required to do so?

Similar examples are found in baggage claim areas, and on ticket and departure area lines. In virtually all such cases no effort has been made by the airlines even to suggest that passengers refrain from smoking as a courtesy to fellow nonsmoking passengers—even though such protections have worked well in many areas where required by law.

Additional evidence of how carriers fail to adequately protect nonsmokers is provided by comparing the performance of U.S. carriers subject to CAB regulation with foreign carriers flying the same routes—e.g., transatlantic. Our experience is that the foreign carriers are far more likely not to enforce no-smoking rules, to force nonsmokers to fly in smoking sections, and to even violate their own rules relating to smoking when it is convenient to do so. For example, Swissair not long ago suddenly made two rows in the middle of its no-smoking section "smoking" to accommodate a late-booking charter group. This kind of blatant conduct is rare for U.S. carriers because it can result in fines of up to $1,000. Foreign carriers flying the same route, and presumably subject to the same consumer demand, are far more likely to fail to protect nonsmokers because they are not subject to any such regulation.

Indeed, one of the many problems of relying on the marketplace for basic protection is that it cannot and does not respond to a minority. While several recent surveys show that the majority of passengers favor a total smoking ban, at least on short flights, probably only a minority of passengers are affected seriously enough by smoking that they must alter their flight plans. But these passengers—who clearly number in the millions—are handicapped persons, and are entitled to the same "reasonable accommodation" and regulation, where necessary, as those with other handicaps, and for exactly the same reasons. One federal court and several federal agencies have held that persons sensitive to tobacco smoke are "handicapped persons" within the meaning of the federal statutes, and entitled to special protection—even if there is not sufficient market demand to force the airlines to provide it.

Finally, the best evidence of the need for continued federal regulation in this area is the positions taken by the two federal agencies most familiar with the problem. The CAB has repeatedly rejected suggestions by the airlines that it discontinue its regulations in this area, and rely on airline discretion and marketplace pressures to protect nonsmokers. It did so even in 1981 at the height of its anti-regulatory zeal. It has refused even to consider this suggestion in its current rulemaking; a rulemaking in which it has already tentatively voted to impose smoking bans because of the intransigence of the airlines.

The other major agency is the Department of Transportation. DOT has filed extensive comments in this rulemaking proceeding which urge the CAB to regulate smoking to the extent feasible. It sets out in strong terms the need for such regulations, and urges the CAB to act forcefully. Surely it, like the CAB, does not believe that competition has or can be expected to provide adequate protection.

What, then, is the alternative? If the CAB's authority in this area is not transferred to some other agency, the airlines are not likely to do away with no-smoking sections. They will, however, be more likely to force nonsmoking passengers to fly in the smoking section if expanding the no-smoking section seems to be too troublesome. They are likely to do even less to protect passengers from the problems of drifting tobacco smoke. They are more likely to refuse to enforce no-smoking rules, or to make exceptions on an ad hoc basis as their European cousins do. As a result, more and more passengers are likely to suffer serious health problems, and a death, heart attack, or other catastrophe is far more likely.

What is also more likely is that there will be more fights, more lawsuits (as we are increasingly having with regard to workplace smoking), and the possibility of conflicting state legislation. After all, if no federal agency has regulatory authority in this area, there is no preemption and states will presumably be free to adopt appropriate legislation. As a result, instead of a workable uniform system with an extraordinary level of compliance which we have had under CAB regulation, there will be conflicting pressures from various directions, regulations and configurations dictated by individual carrier whim or perception of its market, confusion and uncertainty for smoker and nonsmoker alike—just the kind of situation which a central regulatory authority is designed to prevent. For these reasons, we strongly urge you not to allow the carefully-thought-out determinations of the CAB—whatever they may do—to expire without a trace, and federal regulation of this field, which has worked well for more than a dozen years, fall by the wayside simply because economic regulation of airline rates and routes is no longer necessary. There is a world of difference between anticompetitive regulations which stifle competition and boost fares, and simple uniform rules which operate at vitually no cost to provide uniformity and protection for the majority of passengers who are nonsmokers.

Mr. MINETA. Please proceed.

TESTIMONY OF JOHN F. BANZHAF III, EXECUTIVE DIRECTOR, ACTION ON SMOKING AND HEALTH; AND ELIZABETH FAYAD, ASSOCIATE DIRECTOR, COALITION ON SMOKING OR HEALTH, REPRESENTING THE AMERICAN CANCER SOCIETY, THE AMERICAN HEART ASSOCIATION, AND THE AMERICAN LUNG ASSOCIATION

Mr. BANZHAF. Thank you, Mr. Chairman.

Before I begin, I might make a very brief comment on the last subject because in addition to my professional interest in the problems of the handicapped and disabled, I was in fact a handicapped and disabled person over the past year and a half. For approximately 6 months, I had a leg in a long cast, requiring me to keep the leg straight out.

I can assure the committee that there were several instances where I would not have been able to board the airplane, would not have been given a seat in which I could sit with that disability, had it not been for the CAB, had it not been for the fact that I was able to and did cite to their ticket agents the CAB regulations and suggest to him the possibility of a $1,000 fine.

It was only after I did that on several occasions that the airline gave me a seat that I could fly, and it permitted me to board. That is not something which could be cured through the authority that the FAA might have, and therefore I would very strongly support the position of the disabled veterans that we just heard, having been a disabled person myself.

Turning now to smoking, Mr. Chairman, our message to the committee is a very simple one, and it is: Please, do not make us fly the friendly skies of United or Eastern or American or any of the other major carriers without some protection against the very well documented problems of smoking.

For nonsmokers, and particularly for the estimated 30 to 40 million Americans who have some particular susceptibility to tobacco smoke, those skies are not very friendly. Indeed, there is ample evidence from many different sources that without an agency responsible for protecting passengers with regard to smoking there will be numerous problems—not just for the nonsmoking passengers, not just for the sensitive nonsmoking passengers, but also for the airlines themselves in the form of conflicting State and local legislation, and lawsuits under a variety of theories.

My name is John Banzhaf and I am executive director of Action on Smoking and Health—more commonly known as ASH. ASH is a national nonprofit scientific and educational organization which in 1969 filed the first petition seeking separate no-smoking sections aboard commercial aircraft.

Since that time because of the intransigence of the airlines, we have been forced to go back again and again before the CAB to ask them to tighten up the rules protecting the majority of passengers who are nonsmokers.

We have also been involved in a number of lawsuits, seeking to protect nonsmoking passengers. In short, we are the organization most directly involved with this matter and, I think, the one with the most expertise concerning these problems.

ASH believes that it is vital for the Congress to adopt legislation to insure that the consumer protection authority and rules of the CAB continue unimpeded and without interruption after the agency sunsets. If such general legislation is adopted, we see no reason why smoking should not be included.

Indeed, we believe that the need to assure protection related to smoking is even more important than in other consumer areas for two reasons:

The first is that it is the only consumer problem which relates directly to safety and health.

The second is that although some of the functions under 411 may be picked up by the FTC, it is clear that without new legislation consumer protection against the problems of smoking will be discontinued, and passengers will be left to the not-too-tender mercies of the individual carriers.

Now, it has been argued that even without an agency to enforce compliance, the airlines would continue to provide adequate protection, based upon simple market demand. They say that they now recognize the needs of nonsmokers.

But this argument is demonstrably false and many different types of evidence clearly establish that a central regulatory authority is necessary. I would like to very briefly outline these various different kinds of evidence.

First, Mr. Chairman, every major action that the airlines have taken to protect nonsmokers has been forced on them by the CAB. In no case have the major carriers gone one step beyond what is minimally required by law—and I spell that out in our testimony.

In short, the airlines have not shown a history of responding to demonstrated need, but rather a history of resisting it until ordered by the CAB. There is no evidence that they have yet changed their tune. Indeed, there is every recent indication to the contrary.

Just last month, the CAB heard testimony of an incident in which a young mother and her infant child were forced to be seated in the last row of the nonsmoking section. The smoke from the passengers immediately behind drifted up and engulfed them—caused both mother and infant to suffer serious asthmatic attack requiring a physician's care.

The smokers refused to refrain and the airline did absolutely nothing. And this, Mr. Chairman, is by no means an isolated instance, and I will give you only three more.

In a documented case before the CAB, a man who had just recovered from a triple-bypass heart operation was forced to stand in the isle for an entire transatlantic flight because the smoke drifting across to his seat was too much for him in his condition.

In an earlier CAB proceeding, a physician testified about a patient who had to be taken to a hospital in an ambulance because smoke exposure on a brief flight caused her such significant breathing difficulties.

A third example is a couple who had their 2-week vacation in Europe ruined because the wife had to be admitted to a hospital as a result of cigarette smoke she was exposed to on the plane.

Mr. Chairman, such violations are not isolated, they are systematic. For almost 2 years, Pan American decided to seat smokers across the aisle from nonsmokers, and despite mounting complaints of that drifting smoke did nothing until the CAB initiated enforcement proceedings.

Similarly, TWA sandwiched a no-smoking section between two smoking sections in a large cabin. Again, there were a large number of complaints. People were being made sick. Nothing was done until the CAB brought enforcement action.

Even more recently, there have been hundreds of complaints not only from passengers but also from normally young and healthy flight attendants who complained of dizziness, headaches, and lightheadedness because of smoke. These complaints have resulted in a Senate hearing before Senator Inouye, but the airlines have yet to take any corrective action. That is one clear piece of evidence.

A second is to look at the areas and ask what the airlines have done in areas where they are not now subject to regulation. The airline's own statistics indicate that 70 percent of their passengers prefer to be seated away from smokers.

Yet, when these same passengers are seated in departure lounges, most of the carriers provide no protection at all, not even a request that people sit in a separate smoking and no-smoking section.

I wonder, Mr. Chairman, do the airlines really believe that this desire for clean air only occurs to people over 30,000 feet, or is this simply an example of the airlines' unwillingness—unless forced by regulation—to accommodate the growing needs of nonsmokers?

There are similar examples in lines for tickets, departure areas, and baggage claim areas. In all of these areas, since they are not regulated by the CAB, the airlines have done nothing to protect the nonsmokers, except in those few areas where State or local legislation has required.

Another very simple way of seeing how insensitive airlines are to the needs of nonsmokers is to compare our regulated carriers and their competitors, the European carriers, over a common route such as the transatlantic. Our experience is that foreign carriers are far more likely not to enforce the no-smoking rules; to force nonsmokers to fly in the smoking section, and even to violate their own rules when it seems to be convenient to do so.

Not too long ago, Swissair decided to establish a smoking section in the middle of their nonsmoking section because some late-booking passengers were smokers and those were the only seats left.

Now, this kind of blatant misconduct is rare in the U.S. carriers, and the reason is because they are subject to CAB jurisdiction and they have suffered over $100,000 in fines for violating CAB rules. But a good example of what carriers exposed to the same kind of consumer pressure and consumer demand will do is provided by examining these foreign carriers which are exempt from these requirements.

Indeed, Mr. Chairman, one of the many problems of relying on the marketplace for basic protection is that it cannot and does not respond to a minority. While several recent surveys show that the majority of passengers prefer a smoking ban—at least on short flights—there are probably only a minority of passengers who are so seriously affected by smoke that they will alter their flight plans. But these passengers who number in the millions and who either cannot fly or fly only at great risk to their health are in every sense of the word handicapped persons and are entitled to the same reasonable accommodation, where necessary, as those with other handicaps—and for exactly the same reason.

This is not idle speculation; one Federal court, two major Federal agencies have held that sensitive nonsmokers are handicapped persons within the meaning of the Federal legislation and that they are entitled to special protection, even if there is not sufficient market demand for it.

Finally, the best evidence of the need for continued Federal regulation in the area of smoking is the position taken by the two Federal agencies most familiar with the problem. The CAB has repeatedly rejected suggestions by the airlines that it discontinue its regulations in this area and rely on airline discretion and the marketplace pressures to protect smokers. It did this even at the height of its antiregulatory zeal in 1981. It certainly is not persuaded now when it has totally rejected twice the airlines' arguments to leave this to the marketplace.

The other major agency is the Department of Transportation. DOT has filed extensive comments in the CAB's current smoking rulemaking proceeding which urged the CAB to regulate smoking to the extent feasible and to ban it totally to the extent feasible. It sets this out in strong an unequivocable terms.

Surely DOT, like the CAB, does not believe that competition has or can be expected to provide adequate protection.

What, then, is the alternative? If the CAB's authority in this area is not transferred to some other agency, presumably DOT, the airlines of course are not likely to do away entirely with no-smoking sections. We would never suggest that.

They will, however, be far more likely to force nonsmokers to fly in the smoking section, particularly if expanding the no-smoking section is a little inconvenient. They are likely to do even less to protect passengers from the problems of drifting tobacco smoke—today a major problem before the CAB. They are more likely to refuse to enforce their no-smoking rules, or to make individual exceptions on an ad hoc basis as their European cousins frequently do.

As a result, Mr. Chairman, more and more passengers are likely to suffer serious health problems, and a death aboard an airplane, or a heart attack, or some other catastrophe is far more likely.

What is also far more likely is that there will be more fights, more lawsuits. We are involved in dozens of lawsuits right now concerning smoking in the workplace, and the possibility of conflicting State legislation. After all, if there is no Federal agency with authority in this area, there is no preemption and the States, presumably, would be free—perhaps even the cities—to adopt appropriate legislation. Three-fourths of the States already have on their books legislation protecting nonsmokers' rights. Some States regulate interstate buses passing through their jurisdiction.

As a result, instead of a workable, uniform system with an extraordinary level of compliance which we have now under the CAB, there will be conflicting pressures from various directions, rules, and configurations dictated by individual carrier wim, confusion, and uncertainty for smoker and nonsmoker alike—just the kind of situation which a central Federal regulatory agency is designed to prevent.

For these reasons we very strongly urge you not to allow the carefully thought-out determinations of the CAB—whatever they may be when they vote in 1 month or so—to expire without a trace, and for Federal regulation in this field which has worked for more than a dozen years to fall by the way side simply because economic regulation of airlines is no longer necessary.

There is a world of difference between anticompetitive regulations which may stifle competition and boost fares, problems that sunset was aimed at, and simple uniform smoking rules which operate at virtually no cost to provide uniformity and protection for the majority of airline passengers who are nonsmokers.

Thank you. I will be delighted to respond to questions, to elaborate, or to discuss any of that testimony, Mr. Chairman.

Mr. MINETA. Thank you, Mr. Banzhaf.

Ms. Fayad.

Ms. FAYAD. Thank you, Mr. Chairman.

Mr. Chairman and members of the subcommittee, my name is Elizabeth Fayad and I am appearing before you today to present the views of the Coalition on Smoking or Health, the American Heart Association, the American Lung Association, and the American Cancer Society.

The coalition was founded on March 5, 1982, by the ACS, the AHA, and the ALA to bring smoking prevention and education issues to the attention of legislators and other governmental officials. The coalition also serves as a public policy project with the National Interagency Council on Smoking and Health, an organization backed by 24 additional private health, education, and youth leadership organizations.

The Coalition on Smoking or Health believes it is absolutely essential to maintain the authority of the Federal Government to issue rules governing smoking aboard commercial aircraft when the authority of the Civil Aeronautics Board to do so expires at the end of 1984.

We believe that the authority of the Federal Government to issue rules governing smoking aboard aircraft is in the public interest for the health, comfort, and safety of both passengers and crew. Cigarette smoking is the single most preventable cause of death and disease in the United States. Each year over 340,000 Americans die from smoking-related diseases. More than 75 percent of lung cancer cases and chronic obstructive pulmonary diseases are caused by cigarette smoking. In addition, no risk factor is more important than smoking in causing heart disease. Thus, smoking prevention and education is an activity of unparallel importance for the health of the American public.

At the time the Civil Aeronautics Board originally promulgated rules governing smoking on commercial aircraft, there was little concrete scientific evidence about the dangers of side-stream smoke to nonsmokers. In fact, virtually all the scientific evidence concerning the possible health effects of side-stream smoke on nonsmokers has been published within the last decade.

Whether or not one concludes that the evidence which has accumulated on these dangers over the past several years is sufficient to conclusively demonstrate the harmful effects of side-stream smoke, even the most conservative review of the scientific literature demonstrates that more than sufficient evidence exists to justify and require carefully drafted, reasonable regulations designed to safeguard the health and comfort of nonsmokers aboard commercial aircraft.

Passengers and crew aboard commercial aircraft are placed in a position which makes them more vulnerable to, and least able to escape from, the harmful effects of side-stream smoke. Except in elevators where smoking is routinely prohibited, there is no location in our society where individuals are placed in closer confinement with other individuals than aboard commercial aircraft. Given that the vast majority of Americans are nonsmokers, the travel by air has become a major means of transportation in the United States and that no public place is more confining than an airplane, the need for regulations to protect nonsmokers is apparent.

Many passengers aboard commercial aircraft are particularly sensitive or susceptible to the harmful effects of side-stream smoke. To date, the primary attention of the CAB concerning particularly sensitive passengers has focused on those passengers who suffer acute, immediate reaction when surrounded by cigarette smoke. This view may be too narrow and other particularly sensitive persons should be considered who do not necessarily suffer an immediate reaction.

For example, within the last several years, the harmful effects of smoking by pregnant women on the unborn fetus have been well documented. Smoking by pregnant women has been associated with an increased risk of stillbirth, miscarriage, and birth-weight deficiencies. All women who receive competent medical advice are urged not to smoke and to avoid cigarette smoke while pregnant. Similarly, recent studies have focused on the particular harmful effect of side-stream smoke on young children.

Since the CAB originally adopted rules governing smoking aboard commercial aircraft, rules governing smoking in public places to protect the nonsmoker and to reduce the risk of fire from cigarettes have gained widespread acceptance. CAB's current smoking rules provide no more inconvenience to the smoker and no more protection to the nonsmoker than is already provided in a variety of settings, such as movie theaters, concert halls, public buildings, and health-care facilities.

The traveling public has come to rely on and support the rules governing smoking aboard aircraft to protect them from being subjected to cigarette, pipe, and cigar smoke and to provide them additional protections from the dangers of fire aboard aircraft.

For all these reasons, the coalition believes that rules governing smoking aboard aircraft are essential and urges Congress to transfer the CAB's authority in this regard to another Federal agency.

The authority of the Civil Aeronautics Board to issue rules governing smoking aboard aircraft is based on section 404 of the Federal Aviation Act. As you know, the Board regulates smoking aboard aircraft in fulfillment of its obligation to insure that airlines provide fair and adequate service to airline passengers. However, when Congress passed the Airline Deregulation Act of 1978, it made no provisions for the transfer of the enforcement of section 404 to another Federal agency.

As the Secretary of Transportation testified before you recently, since the ADA does not provide for the transfer of section 404 safe and adequate authority upon which domestic smoking regulations are based, this authority will expire at the end of 1984.

Secretary Dole and the coalition differ on what should be done about this state of affairs, however. Secretary Dole does not believe the absence of Federal smoking regulations will be a problem and that airlines will continue to maintain separate areas for smokers and nonsmokers. We are not as sanguine as Secretary Dole.

At the recent CAB hearings on its proposed rules, several airlines testified in opposition to the proposed rules in a manner which suggested that they did not intend to assure nonsmokers a seat in the nonsmoking section when the CAB is sunsetted. These carriers argued that the smoking rules were at odds with their first come, first serve, no reservations, and no assigned seats operations. Further, the designation of smoking and nonsmoking sections is not enough protection for the nonsmoking majority of airline passengers. It is important that the nonsmoking section be extended if necessary to provide seats for all nonsmokers who present themselves for boarding within a reasonable length of time before the aircraft is scheduled for departure.

The designation of a nonsmoking section is not the only rule governing smoking aboard aircraft which concerns the Coalition on Smoking or Health. The ban on smoking when the aircraft's ventilation system is not fully functioning should be maintained. If smoking is not prohibited when the ventilation system is operating at diminished capacity, nonsmokers will be subjected to excessive levels of cigarette smoke which will adversely affect their comfort and could adversely affect their health, as Professor Banzhaf has alluded to several examples.

Persons whose health makes them especially susceptible to cigarette smoke also need to be given consideration. The airlines have the obligations of a common carrier to attempt to provide service to all persons wishing to travel. If smoking by some passengers precludes other persons from being able to travel at all, the rights of the nonsmoker should prevail. Smoking has never been construed to be a person's right aboard aircraft. Smoking is a privilege which may be denied, given the circumstances and other health and safety considerations.

For all these reasons, the Coalition on Smoking or Health urges Congress to adopt legislation transferring the CAB's authority under section 404 of the Federal Aviation Act to another Federal agency.

In closing, Mr. Chairman, the coalition would like to comment you for your careful analysis of airline deregulation issues and your unfailing concern for consumer protection and the rights of the nonsmoking majority.

Thank you very much for the opportunity to appear before you.

Mr. MINETA. Thank you very much, Ms. Fayad.

The Department of Transportation has argued that the pressures of the marketplace will lead airlines to keep current smoking regulations even if they are not required to do so by Government regulation.

Ms. Fayad, what is your view of what the airlines will do voluntarily if Government regulation on smoking ends when CAB sunsets?

Ms. FAYAD. Well, our groups are very concerned that while they will have a smoking and a nonsmoking section, some of the other rules governing smoking aboard aircraft they will no longer apply and they will be, as Professor Banzhaf suggested earlier, reluctant to enlarge the nonsmoking section to accommodate all the travelers in the group, you know, that want nonsmoking seats.

So, we still believe we would rather have Federal regulation of this rather than regulation of the marketplace.

Mr. MINETA. Mr. Banzhaf.

Mr. BANZHAF. Mr. Chairman, I would agree and I think we have a split here. On the one hand, the Department of Transportation through its staff, after very careful study of this specific problem, has filed written comments before the CAB which strongly support their current efforts not just to keep the existing rules but to go far, far further.

On the other hand, Secretary Dole testified in this proceeding as to one tiny little section of this overall problem to the effect that maybe these rules were not needed, although I understand she subsequently testified that she would have no objection to having this authority transferred over.

I think, Mr. Chairman, if we look at what the airlines have done under the 12 years of this regulation where they have resisted everything and never made a step forward, if we look at the blatant violations which occur even though the rules are in effect, if we look at their total disregard of the smoker in areas where the regulations do not apply. If we look at other carriers which are not subject to the regulation but presumably feel the same market pressure and what they do. I think what the prediction will be is, they will keep the no-smoking section.

More and more nonsmokers will be forced into the smoking section, though, if they do not get there first. We will have nothing done about the problem of drifting and recirculating tobacco smoke, which the CAB and others have recognized as an increasingly important problem.

There will be no protection, as the CAB is now contemplating, for the people with special sensitivities to tobacco smoke who are literally as handicapped as the people in wheelchairs. If you cannot sit in an area where there is drifing tobacco smoke, you cannot get on that plane, the same as the person whose wheelchair will not go up a ramp.

Putting all these together, I think the dire prediction will be, the airlines will do nothing and the result will then be that we will go to the individual States and ask for legislation there, and we will simply have to bring more lawsuits against the airlines, and you will then have regulation by lawsuit and piecemeal rather than a unified agency providing the uniformity that we have had so far.

By the way, one of the major problems in this area that we found is the need for uniformity. If airlines have different rules that in one case the no-smoking section is here and another case it is here; in some cases it does not exist, we have problems with smokers, we have problems for nonsmokers.

One of the major purposes and one of the major benefits, we think, of CAB regulation has been a uniformity across the board, making sure everybody knows that the rules are and allowing competition within that to occur.

Mr. **Mineta**. There seems to be considerable demand for accommodating nonsmokers. It is my understanding that Muse Airlines has a Los Angeles-Houston-New Orleans service which is totally nonsmoking and has been a success.

Recently, these flights have operated at load factors exceeding 70 percent. Your testimony indicates that more than 50 percent of airline passengers are nonsmokers. In view of this apparent demand for nonsmoking service, why do you think most airlines are so indifferent to the needs of nonsmokers?

Ms. Fayad.

Ms. **Fayad**. Well, I think some airline managements are more flexible and creating than other airline managements. Certainly, Muse took a chance on operating this service and it has turned out to be successful. Of course, our groups are very excited about all that.

But I think the fact remains, as we said before that, airlines have never really bent over backward to try to provide for nonsmokers in the absence of CAB regulation. I understand they resisted an FAA recommendation to install smoke alarms in the lavatories, even though there are some exceptions to that as well.

So, I mean, we feel like nonsmokers' rights need to be protected by a Federal agency.

Mr. **Banzhaf**. Mr. Chairman, I might add that I think the airlines here are no different from virtually any other business. Businesses are slow to respond to changes and tend to do so only when there is overwhelming consumer demand for legislation. Businesses generally did not respond to the needs of blacks; they did not respond to the needs of women, they did not go out and deal with problems of sexual harassment, they did not go out and deal with the problems of the handicapped.

The airlines in this area are no different. If we are willing to wait another 10 years, perhaps they will see the handwriting on the wall. The recent surveys show that the majority of nonsmokers as well as smokers are in favor of increased restrictions on smoking in public places. But the history, I think, of all of these acts and the Federal Government's view is, we do not necessarily wait for market demand where we see an important problem.

Particularly, we are talking about safety and health, we do not want to wait around for the industry to perceive that demand and react to it.

Mr. **Mineta**. Mr. Banzhaf, you maintain that there is a possibility of lawsuits by nonsmokers if Federal regulation ends. On what grounds could the nonsmokers sue?

Mr. **Banzhaf**. The nonsmoking passenger could sue either in contract action for breach of the contract provisions of his ticket or, more likely, under tort since airlines as common carriers are required to provide the very highest standard of safety and care to their travelers.

Therefore, either under a negligence action or even under an intentional tort theory I believe that the passengers would be entitled to bring those kinds of actions.

There may also, Mr. Chairman, even be actions by one passenger against another. There is law to the effect that a nonsmoker who is seriously affected by a smoker may indeed have a cause of action.

In addition to that, of course, I think there would be the same pressure for legislation both at a State level and at a local level that we now find for dealing with workplace problems, and the end result would be a giant mess.

My organization will be accused, as it always is, of being a "sue them first," but we would much rather have Federal uniform regulation rather than have to be forced into the posture of bringing individual legal actions.

Mr. **Mineta**. Now, if Federal regulation on smoking ends, will the organizations you represent work to have the States regulate this area, and do you think that there are States that would be willing to restrict smoking on aircraft?

Ms. Fayad.

Ms. **Fayad**. Well, we have not really discussed what we will do. We are hopeful that Congress will step in here and fill the void, and make sure the rights of the nonsmoking traveling majority will be protected.

My groups do not usually choose litigation as the main defense to this kind of thing. But, you know, we will be open to all sorts of things if it becomes a problem, which we believe it will become a problem if Congress does not act.

Mr. **Banzhaf**. I might add, Mr. Chairman, that even under the current regulations there have been perhaps half a dozen lawsuits. We have not been involved in any of them, but we understand that they have been brought concerning these issues and, in some cases, there have been settlements.

So, I shudder to think what would happen if the protection were totally revoked. At present, I think there is a very good argument in any lawsuit that the doctrine of primary jurisdiction would apply and that a court would probably tend to defer to the Civil Aeronautics Board.

If the Civil Aeronautics Board or some other agency did not have jurisdiction, the argument of primary jurisdiction would disappear and I think the courts would be much more likely to entertain these kinds of suits.

Mr. **Mineta**. Ms. Fayad, Mr. Banzhaf, thank you very much for being here and making your presentations before the subcommittee.

The subcommittee will stand in recess now until 1:45 p.m., and we will then start with the very distinguished gentleman from United Airlines, Mr. Monte Lazarus.

[Whereupon, at 12:35 p.m., the subcommittee recessed, to reconvene at 1:45 p.m., on the same day.]

AFTERNOON SESSION

Mr. **Mineta**. The subcommittee will please come to order. We are pleased to start off this afternoon's session with Mr. Lazarus, the senior vice president for external affairs, United Airlines.

TESTIMONY OF MONTE LAZARUS, SENIOR VICE PRESIDENT, EXTERNAL AFFAIRS, UNITED AIRLINES

Mr. **Lazarus**. Thank you, Mr. Chairman. Once again United Airlines appreciates the opportunity to testify on a phase of airline deregulation. This time happily, we are discussing sunset-related amendments to the Federal Aviation Act.

United is grateful to you, Mr. Chairman, the members of your subcommittee, and the entire Congress for passing the Airline Deregulation Act of 1978. We are even more grateful that you have consistently supported deregulation through a fuel price crisis, a PATCO strike, and a serious recession, each of which distorted the marketplace and each of which threatened deregulation itself.

United believes that there are certain general guiding principles to consider as the Civil Aeronautics Board disappears into the sunset. Without lumbering you with reams of data, analysis, and opinion, we think the record is clear enough that deregulation is working and working well. The industry has come through the trying transition from stifling regulation to a relatively free market.

Carriers are emerging more lean, more productive and more attuned to public demand. It is unfortunate that some companies in our business, as in other businesses, cannot survive the crucible of the marketplace, but that is the nature of a competitive economic system.

We think the future thrust of deregulation should be to rely on the marketplace and to treat our business as the Government treats any other nonutility business.

Viewed in that context, we believe there is a strong argument against any sunset related legislation. It can well be argued that the general framework of deregulation is well in place, that legislation this year threatens to be encumbered with morsels for this or that special interest and that any cleanup legislation can easily wait until after CAB is laid to rest.

We are sensitive to that argument, recognizing that reasonable people can and do differ on the need for a bill this year. We would prefer no bill to one laden with gifts for everyone.

Against that framework we offer the following general principles:

One. Congress should vigorously pursue deregulation and any legislation should be aimed at cleaning loose ends and taking care of significant matters previously left open.

Two. CAB should be allowed to sunset on December 31, 1984, and there should not be any attempt to revive any form of price, tariff, or route regulation.

Three. Our business is not substantially different from others, and we should be subject to the scrutiny as any other industry.

Four. Congress should avoid creating new bureaucracies which will tend to perpetuate the unnecessary, costly, restrictive practices of the CAB.

In that context let's examine our three principal concerns in any bill:

First, we share the view of other carriers on the need for a strong Federal preemption section to obviate the problem of piecemeal regulation by 50 States and localities.

ATA has presented you with a detailed proposal and we associate ourselves with it.

Second, we believe consumer protection and anticompetitive issues properly belong before the Federal Trade Commission. Why? Because that independent agency has long experience in both areas, because it has the broad view of how consumer regulations should work across the economic spectrum, because we are concerned that if a new consumer function is created at the Department of Transportation we may well wind up with "Nine Characters in Search of an Author," a bureau looking for something to regulate.

It is beyond question by now that a regulator abhors a regulatory vacuum. He or she will seek to step into the marketplace at the drop of a regulation. We say: reasonable regulation, yes; unreasonable, make work, please, please no.

In the event you are concerned about the how-to aspect of getting jurisdiction over the FTC with a body or rules and regulations, it is not that difficult. Congress can remove our exemption from section 5 of the Federal Trade Commission Act and can by a savings provision transfer over the body of CAB rules and regulation.

There are those who insist that the industry would not protect consumers in the absence of comprehensive regulation. For those who doubt whether airlines would continue to offer no-smoking seats or deny boarding compensation in the absence of any rules, we can only tell you that the marketplace is a far more compelling regulator than any agency or department. In other words, we will have consumer protection, regulation or not.

If you are concerned about the essential air services program, fine. Put it in the Department of Transportation. That is a legitimate function for an executive branch department. If you are also concerned about splitting jurisdiction over consumer and anticompetitive practices internationally and domestically, then put it all in the Federal Trade Commission. Let the Department of Transportation deal with those matters within its broad range of competence such as international policy, international route selection, and essential air service.

Finally, continue to transfer agreement and antitrust immunity jurisdiction to the Department of Justice. It is more than common sense to put these matters in the hands of the antitrust experts. It is consistent with the Government deals with other nonutility industries.

There are those that may argue that the Department of Justice will bring down the interline system in whole or in part. We disagree. There is no evidence that Justice has acted in this manner over its long history.

Indeed, we are likely to find more logic and consistency in the Department of Justice than in another department more attuned to policy and and political considerations.

Since matters of international affairs peculiarly fall within that policy and political ambit, they should properly go to the Department of Transportation.

Mr. Chairman, we have given you our concerns, judgments, and recommendations. To be sure, these are debatable issues. We respectfully request that you give your usual full consideration to our general principles and specific recommendations.

Thank you.

Mr. **Mineta**. Thank you very much, Mr. Lazarus.

Your testimony suggests that cleanup legislation can wait until a later session of Congress. However, yesterday we heard testimony from the Federal Trade Commission that they do not believe that they will be able to regulate airlines under section V of the FTC after CAB sunset, and it appears to be conceded on all sides that section 404 or 404(a) will lapse when CAB sunsets.

Now this being the case, would you agree with me that if no legislation is enacted, there would be no agency with authority to enforce sections 404(a) and 411 after the CAB sunsets, and doesn't this establish some urgency for passing legislation before sunset?

Mr. **Lazarus**. The answer is we share your concern, Mr. Chairman. We do believe that there are arguments saying that 411 will be kept alive. We happen not to agree with those arguments.

If there is a sense of urgency about keeping 411 alive and 404(a) indeed, by all means, we prefer to have that cleaned up and we prefer to have a Federal preemption section in a bill.

We are merely pointing out that there is a strong argument against a bill this year. We would prefer no bill to a badly written bill. We have no objection to a cleanup bill this year.

Mr. **Mineta**. Your suggestion for legislation to remove the airline exemption from section 5 of the Federal Trade Commission Act would not continue section 404(a), which is the basis for the Board's smoking regulation and the Board's regulations prohibiting discrimination against the handicapped.

Would you propose that section 404(a) also be continued and administered by the Federal Trade Commission?

Mr. **Lazarus**. Yes, sir.

Mr. **Mineta**. With respect to smoking regulations, you state that the marketplace is a far more compelling regulator than any agency or department, but isn't it true that when there weren't any smoking regulations the marketplace led airlines to do no more than establish a no-smoking section. If that section were filled, a nonsmoking passenger would have to sit in the smoking section.

If we decide as a matter of policy that we want all passengers who arrive at reasonable times before a flight departs to be guaranteed a no-smoking seat, what reason do we have to believe that the marketplace would produce this result?

Mr. LAZARUS. Marketplaces change, Mr. Chairman. What you say is true. The fact is that United Airlines and perhaps some others did establish no-smoking sections before ordered to. The public mood has changed. It is very obvious to us that we will continue to offer no-smoking sections and enforce the no-smoking section rules whether or not there is a reglatory body to enforce it.

The public mood has changed on that issue. There is much more concern now than there was before, and it is a simple truth that we will continue to enforce our own rules, but we have no objection to continuing 404(a) and 411 in the Federal Trade Commission.

Mr. MINETA. Do you set aside a standard number of seats on a given size airplane, or will it vary whether it be New York/Chicago on a 727 as compared to Chicago/Denver on a 727, or do you set aside the same number of seats?

Mr. LAZARUS. We will set aside different numbers of seats. I am not sure whether it is done by type of aircraft. However, in the event that there is not an adequate no-smoking section provided, we will then advise all passengers in rows beyond the originally designed no-smoking section that they are included in the no-smoking section. So we do it according to the demand of the people on the airplane.

Mr. MINETA. And if a no-smoking——

Mr. LAZARUS. Let's say we have set aside rows 1 through 3 as no-smoking and we have two people who cannot get into rows 1 to 3 who are in row 4. We will designate row 4 in whole or in part as a no-smoking section and enforce that.

Mr. MINETA. Would you ever move those folks from row 4 to row 6?

Mr. LAZARUS. The smokers or the nonsmokers?

Mr. MINETA. The smokers.

Mr. LAZARUS. Yes; we would if there were room in that section of the airplane.

Mr. MINETA. Now if there is no Government regulation on smoking, isn't it possible that some airlines will treat requests for nonsmoking seats as they do requests for special meals and require a passenger to ask for a no-smoking seat at the time he or she makes a reservation?

If this situation in fact develops, wouldn't there be passenger confusion since the passenger might not know whether the airline he or she is using is one that requires advance notification for a nonsmoking seat?

Mr. LAZARUS. Anything is possible, Mr. Chairman but we deem that quite unlikely. The reason is that every time you add another burden on the customer who calls in you are wasting your own reservations' time, you are complicating your own procedures, and you are making your own life miserable at the check-in counter. That is a cumbersome procedure, it is costly, it is inefficient. Believe it or not, we try to be efficient and we try to save some costs: So we would not do that.

Mr. **Mineta**. I wonder why you don't think it would make sense to have the Department of Transportation deal with antitrust immunity? In international aviation the question of antitrust immunity is related to route and rate policy and DOT will still be regulating international routes and rates. Also, DOT is the agency with the most expertise in the issues involved in determining whether antitrust immunity should be granted, that is, whether there is a compelling transportation need and whether there are other less anticompetitive alternatives which are reasonable. Why shouldn't the immunity be administered by transportation experts with input from the antitrust experts at the Department of Justice rather than the other way around?

Mr. **Lazarus**. Simply because the true expertise in the antitrust field lies with the Department of Justice and not with the Department of Transportation. There is a strong body of law and precedent at the Department of Justice. There is a strong history of consistency at the Department of Justice, more so, I submit, Mr. Chairman, than there is at the Department of Transportation.

We think it is imperative to treat us as you treat any other business. We are no different than anybody else.

Mr. **Mineta**. Well, there aren't too many other businesses that receive antitrust immunity though. Everyone says, "yes, we want to be treated like all other businesses," but how many other businesses really are granted antitrust immunity?

Mr. **Lazarus**. We are not asking for it, Mr. Chairman. We would be quite content without it.

Mr. **Mineta**. What about the area settlement plan?

Mr. **Lazarus**. The Department of Justice has assured us, and my colleagues have been in meetings with the Department of Justice and we have participated in industry meetings with them. They have assured us, and they have told you on the record, that they have no problem with the area settlement plan. It is not anticompetitive and it furthers the public interest.

We are willing to take our chances with the Department of Justice. We think that is the way we should be treated.

Mr. **Mineta**. Remind me to give you a bottle of Arpege. [Laughter.]

Mr. **Lazarus**. I will give it to my wife, Mr. Chairman. [Laughter.]

Mr. **Mineta**. Mr. Hammerschmidt.

Mr. **Hammerschmidt**. Thank you, Mr. Chairman.

Mr. Lazarus, in your testimony you did not address the question of financial fitness certification. Under existing law, carriers providing domestic service, other than 419 commuter carriers, would no longer be subjected to a financial and managerial fitness review as now conducted by the CAB.

I would be interested, nevertheless, in your opinion on a legislative proposal to transfer section 401 domestic fitness authority to DOT rather than merely allowing the FAA to incorporate this into its safety certification function.

Mr. **Lazarus**. In anwer to that question, Mr. Hammerschmidt, I think it is necessary to draw the distinction between safety-related functions and economic functions.

Our judgment is that safety-related rules are foremost and they should be enforced with the strictest vigor. So there should be a screening of any new carrier from a safety viewpoint.

I think it ill behooves United Airlines as the largest airline in the United States, to set up any economic barriers to entry. We have come before your committee in the 1970's arguing for total deregulation of our business and we are consistent. We believe there should be no economic barriers to entry. We believe there should be safety scrutinies. So we disagree with the need for a financial fitness test, except as any test relates to the issue of safety.

Mr. HAMMERSCHMIDT. You have advocated that the Federal Trade Commission should receive the CAB's authority under section 411 of the Federal Aviation Act. Would you still support FTC jurisdiction in this area if the Congress adopted a provision which would allow the FTC to use informal rulemaking procedures for airline industry rules as opposed to the more cumbersome procedures required by the Magnuson-Moss Act?

Mr. LAZARUS. Indeed, we would, yes.

Mr. HAMMERSCHMIDT. Thank you.

Thank you, Mr. Chairman.

Mr. MINETA. Mr. Packard.

Mr. PACKARD. Thank you, Mr. Chairman.

Mr. Lazarus, you have indicated in your testimony that transferring antitrust authority to the Department of Justice upon sunset of CAB would be acceptable to you.

As you know, most of the industry strongly supports transferring sections 412 and 414 functions to the DOT. In light of DOT's expertise in the area of transportation issues do you believe that having antitrust authority in DOT would be more desirable than accepting it in the Department of Justice?

Mr. LAZARUS. No, sir, we don't. It depends on which end of the problem you are looking at. We think that antitrust problems are just that and they should be looked at by the experts in the Department of Justice just as they do for any other nonutility business.

This is not simply a transportation issue that we are talking about, in our judgment. It is a question of enforcement of the antitrust laws and we believe that should be done by the Department of Justice.

Mr. PACKARD. Let me carry the question then a little bit further to other areas of CAB's current responsibilities. There are some that feel that it would be perhaps more acceptable to have the DOT be the umbrella of all of the existing responsibilities of CAB rather than having it fragmented and distributed out to a variety of agencies like the FTC and the DOT and the Department of Justice, et cetera.

Do you feel that there is advantage for the consumer public of having one agency responsible for all the functions of CAB in the future?

Mr. LAZARUS. No, sir, we don't. We do not see any particular advantages and, indeed, we see a possible serious disadvantage, and that is the creation of another vast bureaucracy.

If all Congress is going to do now is take existing functions and just simply transfer them from the moribund CAB over to an active DOT, we have a lingering fear and a suspicion that what is going to happen is that you will create regulators who want to find something to do, and we will be back in the regulatory ball game again. We don't want that.

Mr. **Packard**. And that argument would not hold true by fragmenting it into different departments?

Mr. **Lazarus**. It would not, sir, in our judgment, because at the FTC they have a history of dealing with certain anticompetitive practices and certain consumer activities. They are not going to create a vast new bureaucracy to deal with those issues.

On the other hand, if you put them over at DOT, look out. You are going to have a problem on your hands, in our opinion.

Mr. **Packard**. I am not sure I see the reasoning. If you do not remove some of the regulations and responsibilities by deregulation, but simply transfer those to a variety of departments, to me that does not lessen the bureaucracy. It merely distributes it a little differently and would perhaps even create more problems by distributing the bureaucracy to a variety of different departments.

Mr. **Lazarus**. I hate to say divide and conquer, Mr. Packard, but in truth if you divide up some of these responsibilities among agencies that have had long experience in the field, we believe that you will not have the creation of a whole new bureaucracy.

Mr. **Packard**. Thank you, Mr. Chairman.

I have no further questions.

Mr. **Mineta**. I asked about whether the area settlement plan needed antitrust immunity, what about the Air Traffic Conference? You don't feel it needs antitrust immunity?

Mr. **Lazarus**. We do not. We think that it meets the public need. We don't believe it is an anticompetitive practice. The Department of Justice, I believe, if I read their testimony correctly, has said substantially the same thing to you. We have talked to the Department of Justice and we are very comfortable with that assurance.

Furthermore, the Department of Justice has told us they are willing to immunize carriers, if necessary, against treble damage suits, and we think that is——

Mr. **Mineta**. That is to prevent the vexatious policies that they referred to?

Mr. **Lazarus**. Yes; and if indeed you have to have antitrust immunity at all, that is a reasonable proposal.

Mr. **Mineta**. Well, Mr. Lazarus, thank you very much for your presentation. You are a recognized leader in the industry.

Let's see, I believe the American Airlines statement has been filed.

Thank you very much, Mr. Lazarus.

Mr. **Lazarus**. Thank you.

Mr. **Mineta**. At this time I would like to call forward Mr. Edward J. Driscoll, president and chief executive officer of the National Air Carrier Association.

Mr. Driscoll, the full text of your prepared statement will appear in the record at this point.

[Statement referred to follows:]

STATEMENT OF EDWARD J. DRISCOLL, PRESIDENT AND CHIEF EXECUTIVE OFFICER, NATIONAL AIR CARRIER ASSOCIATION

Mr. Chairman and members of the Committee, it is always a pleasure to testify before this committee. I will address the proposed sunset of the Civil Aeronautics Board. More specifically, I will address the Department of Transportation plan for accomplishing this sunset without the necessity for additional legislation as well as providing recommendations to the Committee with regard to fitness, antitrust, insulation from political influence, and consumer protection.

As you know, Mr. Chairman, my last appearance before this committee in connection with this subject was on July 16, 1981. At that time the Congress had under consideration early sunset of the CAB and we voiced our concerns in connection with some of the proposals that were being made. You will recall that we felt it was essential that the Government still require a fitness determination, including financial responsibility and other related safety matters prior to the issuance of any operating certificate for domestic operations. In that connection we proposed an amendment to Sec. 604 of the Act which would require the FAA, prior to issuing a certificate, to make a required finding of fitness. I am attaching, for your ready reference, a copy of that proposal which we made in 1981 incorporating additional amendments to make it more pertinent to the current issue.

At that same session we addressed the matter of political insulation, one that we feared would be lost once the Board (an arm of Congress) was terminated and the functions assigned to the Executive branch without any clear Congressional mandate as to how the functions were to be exercised. We raised questions as to how the procedures would be carried out and recommended that: "Whatever procedure is prescribed, it should be one that will safeguard the integrity of the system. We do not wish to imply that any officer of the Government would not act in a very judicious manner; however, prudence requires that a system be placed into effect, when substantial adjudicatory functions are exercised, to ensure impartial treatment of all applicants and that decisions rendered are in the public interest and ensure fair and equitable treatment of all parties."

We went on to say: "It would appear prudent to establish procedures by legislation. One possible way of doing this, of course, is to create a separate administration with the DOT, similar to the Federal Aviation Administration, for handling foreign air transportation as well as other functions that are transferred. An alternative to this could be, as previously suggested, to set up internally under such an administration a three-member panel of designated individuals to review and pass upon the recommended decisions of administrative law judges."

Since 1981, Mr. Chairman, there have been many differing considerations of the sunset issue. One of these was a CAB Sunset Seminar held on March 2 and 3, 1983, at the National Academy of Sciences, sponsored by the U.S. Department of Transportation. Views of many parties were expressed. I also provided NACA's recommendations. The sense of that seminar was set forth by the Seminar Moderator in a recent report:

"Thus, the feasibility of insulation was broadly accepted. The forum which occupied considerable discussion led to these general conclusions:

"(1) A quasi judicial process presided over by an administrative law judge developing a record and making a specific recommendation as regards the award.

"(2) The final decision based upon such recommendation being made by a Senate confirmed Presidential appointee, wholly and regularly concerned with international aviation matters.

"(3) With a secretary accepting the oversight responsibility for effective execution of the process which would be manifest in acceptance of the 'Administators' decision or a remanding of such decision."

I think it fair to say that many participants in the Seminar recommended a three or many-member panel rather than an administrator, recommended insulation of the process, embraced a separation of function from the Secretary so that a needed independence could be properly maintained.

In order to provide insulation several different methods should be used:

(*a*) For evidentiary insulation one would establish procedural rules, such as, separation of functions and prohibition of ex parte communications.

(*b*) For tenure insulation one would provide the decision-maker or makers with a specific term of appointment and provide he could not be removed except for malfeasance, misfeasance, etc., in office, but not because someone disagreed with the decision that was made.

(*c*) Review insulation could be provided by making sure that the decision-maker would be protected from a reversal of the decision by higher levels of government.

Thus, the decision would stand unless it were remanded for limited reconsideration by a higher authority, such as, the President under Sec. 801 which would be for only foreign policy considerations or considerations of national defense.

When we speak about political insulation, we are not merely talking about the award of routes in limited entry markets, we are talking about any type of adjudicatory function; and there are many of these that will be involved in the continuing function, such as EAS decisions, complaints under the International Air Transportation Fair Competitive Practices Act, pricing investigations, consumer protection enforcement cases, air carrier mergers and acquisitions and the like. All of these are adjudicatory and should be required to be covered by the insulation process.

It is our belief that the continuing functions of the Board should be maintained as an entity insofar as it is practical and above all should not be splintered among several agencies. Thus, we recommend that antitrust immunity should be vested in the Department of Transportation; consumer protection vested in the Department of Transportation so that we will not have two agencies doing the same type activity, one for international, one for domestic, one for EAS or what have you. Likewise, Mr. Chairman, I believe it extremely important that the remaining activity be conducted in such a manner as to not jeopardize federal preemption. We believe federal preemption is essential to an orderly operation of the U.S. air transportation system, both domestically and internationally; and, therefore, any ensuing legislation should make abundantly clear that the United States Government, by permitting deregulation to take place domestically, is still retaining the necessary jurisdiction over entry, fitness, consumer protection and all related matters at the federal level to preclude any successful challenge to this preempted activity.

Mr. Chairman, I will now outline what we propose and then contrast that with the Department of Transportation's plan and provide our recommendations as to how we recommend the Congress should proceed.

(1) FITNESS FINDINGS

As I mentioned previously, we have always felt that there was a need for a fitness finding prior to a carrier being permitted to enter into air transport activity. We had previously stated that consumers should not be put at risk by allowing entry without determining really the fitness of the carrier to conduct the service. In our prior appearance we recommended amending Sec. 604 so that the certificate issued by the FAA would be a certificate of public convenience and necessity and that the FAA would have made a financial fitness finding prior to issuing such certificate. If you will recall, labeling it a certificate of public convenience and necessity was at Member Snyder's suggestion in order to preclude, insofar as possible, a challenge from some that there was no longer a certificate of public convenience and necessity and, therefore, a challenge might lie by a state or to other entity. We suggested a financial fitness finding because we felt that went to the essence of whether an air carrier was properly established and able to conduct a service. We have taken another look and we have concluded that managerial ability also should be part of that so we have amended our proposed Sec. 604 to, not only contain a financial fitness finding, but also a requirement for a finding of managerial ability (including compliance disposition).

Mr. Chairman, I think it is rather self-evident that unless managerial expertise and financial fitness are still requirements for entry, carriers not properly equipped or not properly motivated may enter the system with little regard for the consumer and thus not only will the consumer suffer, but those carriers who are trained to serve the public properly could also be tainted by the activities or reputations of some new entrant who strands passengers, collects money without any intent of really performing the air transportation and such like activity. These measures are essential, not only for the protection of consumers, but for the protection of existing carriers as well, so that consumers and the industry, alike, will be protected against those who are not prepared to operate in accordance with the highest standards of the air transportation industry.

(2) CONSUMER PROTECTION

We previously had felt that transfer to the FTC and their handling this under their existing authority might be adequate. We have changed our minds. We now believe that consumer protection, like financial fitness and managerial ability, is an item that requires special consideration and we are convinced that it should not be splintered between DOT and FTC. We, therefore, recommend that necessary legislation transferring domestic responsibility for continuing consumer protection in accordance with the rules presently followed by the Board to DOT along with the authority they will receive for international. We believe that Sections 404 and 411 of the Act, with regard to domestic air transporation, are equally important to domestic as well as international transportation; and consequently, should be vested in one agency with authority and responsibility to execute the functions of those sections.

(3) INSULATION FROM POLITICAL INTERFERENCE

There is a clear record going back many years that the decision-making process involving substantial awards of authority must be insulated from political interference in order to ensure, not only fairness to the parties, but the appearance of fairness. Congress, in its wisdom, has over the years established commissions which are independent of the Executive branch, especially for the purpose of handling such matters. Such commissions are made up of several members, since it was the view that a collegial body was more likely to evidence impartiality than a single individual.

We have the National Transportation Safety Board, the Securities and Exchange Commission, the Federal Trade Commission, the Interstate Commerce Commission and many others.

The question naturally arises: If we have these commissions and have established them heretofore, why is it that we are doing away with the commission aspect with respect to foreign air transportation? Is that not as important as other matters handled by the Federal Commissions? The Congress, in transferring the authority to the Secretary of Transportation in the 1978 Act did not specify how the functions would be carried out. In fact, it was our judgment that additional reports were required to be submitted to the Congress, which the Board has done, and that additional legislation would probably result prior to the transfer. We believe legislation is necessary and should be enacted. As we have stated previously, we believe the Congress should mandate the procedure to be followed by the recipient agency, the Department of Transportation; and we further recommend that whatever system is placed in effect be insulated from political interference to the maximum extent possible although we recognize that there is no such thing as providing for absolute insulation.

I might point out, Mr. Chairman, that in the many years that we have been under the jurisdiction of the Civil Aeronautics Board and the many years I have been associated with the processing of that agency and the procedures under which it functions, it has been fortunate that the Board has been a collegial activity made up of five members, for if at several times in the past it had been made up of only one member, certain portions of the industry might not be in existence today because of the apparent bias that that individual held for certain types of air transportation. We believe, Mr. Chairman, that it is absolutely essential to ensure fairness and equity, that a three-member commission would provide continuity in the event one member were to leave which would not be possible if there is only a single administrator. A three-member commission would also provide the opportunity for the existence of divergent views and differing perspectives which, in turn, can lead to more considered decisions. However, if Congress, in its wisdom, says it must be a single individual and a single administrator, then we only ask that that system be as well insulated from political interference as a commission would be.

There is one additional thought that if the Congress selects an administrator to exercise the quasi judicial functions, is that not a signal from the Congress that other activities, such as, NTSB, SEC, FTC, and other commissions might not also be changed to line agencies of the Executive part of government for purposes of deficiencies or what have you? Any findings you make concerning the continued activity of the Civil Aeronautics Board could have a great bearing on these other similar structured activities.

(4) ANTITRUST IMMUNITY

Authority for the granting of antitrust immunity should be in one department. There should only be one agency responsible for agreements, mergers and rate matters, not two as is presently proposed by the DOT plan. The Department of Transportation should be the receiving agency, not the Department of Justice, as DOT has the required expertise in transportation; whereas, DOJ does not.

Mr. Chairman, I will now address the Department of Transportation plan. As you will have concluded by now, we are not enthralled by that plan. We find many deficiencies—the fact that fitness determinations would no longer be made domestically, the fact that decisions of an adjudicatory nature would be made by a "senior level career civil servant". With regard to the latter it would be indeed difficult to insulate a career civil servant from political interference. Who makes out or rates his efficiency report? Who determines whether he is entitled to a bonus? Who determines whether he is entitled to a promotion? And last, but not least, who determines whether he continues in the particular job he is in or, as I believe you mentioned, Mr. Chairman, transferred to Alaska for the conduct of some ice function.

Likewise, with respect to consumer protection, the DOT plan is deficient, as it presumes, based upon a questionable legal analysis, that the Federal Trade Commission would pick up an activity it dropped 46 years ago and begin to do it again as if nothing had transpired. In the real world, Mr. Chairman, we believe that the FTC would not act in that manner without some mandate from the Congress. I believe it is unreal to assume that we could successfully sustain a decision made by that agency, without express legislation, if challenged in a court. In short, Mr. Chairman, we believe the plan is deficient because it lacks the express intent of Congress. It assumes an intent which is a very dangerous procedure to follow in light of the many challenges that can be made to the authority for consumer protection, the authority for Federal control; i.e., Federal preemption, etc.

The DOT plan would limit the availability of antitrust immunity to agreements that pertain to domestic aviation. Since filing an agreement is optional, DOT would encourage carriers not to file agreements. In the cases where the Department considers that antitrust immunity should be granted, it may limit it to apply to triple damage actions only. We do not believe that the Department in advance should prescribe what it would do but should leave matters open so that each case can be considered on its own merits and the Department should not take the position that it will encourage carriers to file agreements that pertain to domestic aviation.

Mr. Chairman, in conclusion, it is the position of NACA and its members that there is a dire need for legislation to correctly sunset the Civil Aeronautics Board and to ensure that the functions we have mentioned are correctly carried out. The public interest requires it and particularly, air carriers, who are part of the public, also require the protection that will be afforded by a Congressionally mandated system.

Mr. Chairman, we thank you for giving us the opportunity to express our views and we are ready to attempt to answer any questions you or others members of the Committee may have.

EXHIBIT 1.

AIR CARRIER OPERATING CERTIFICATES

(Certificates of Public Convenience and Necessity)

POWER TO ISSUE

SEC. 604 [72 Stat. 778, 49 U.S.C. 1424[(a) The Secretary of Transportation is empowered to issue air carrier operating certificates (Certificates of Public Convenience and Necessity) and to establish minimum safety standards, including financial and managerial fitness requirements, for the operation of the air carrier to whom any such certificate is issued.

ISSUANCE

(b) Any person desiring to operate as an air carrier may file with the Secretary of Transportation an application for an air carrier certificate (Certificate of Public Convenience and Necessity). If the Secretary of Transportation finds, after investigation, that such person is properly and adequately equipped, has required managerial expertise, is financially fit and able to conduct a safe operation in accordance with the requirements of this Act and the rules, regulations, and standards prescribed thereunder, he shall issue an air carrier operating certificate (Certificate of Public Convenience and Necessity). Each air carrier operating certificate shall prescribe such terms, conditions and limitations as are reasonably necessary to assure safe and adequate air transportation, and shall specify the points to and from which, and the Federal airways over which, such person is authorized to operate as an air carrier under such air carrier operating certificate. (Certificate of Public Convenience and Necessity).

(Underscoring -- additional language) 1981
(Double underscoring -- additional language) 1984

Mr. MINETA. Please proceed.

TESTIMONY OF EDWARD J. DRISCOLL, PRESIDENT AND CHIEF EXECUTIVE OFFICER, NATIONAL AIR CARRIER ASSOCIATION

Mr. DRISCOLL. Thank you, Mr. Chairman.

Mr. Chairman, if I may request that my statement as submitted be made part of the record, I would like to summarize, if I may, from that statement.

Mr. MINETA. Without objection, it has been made part of the record.

Mr. DRISCOLL. Mr. Chairman, it is always a pleasure to be before this committee.

I will address the proposed sunset, and more specifically I will address the Department of Transportation plan for accomplishing sunset without the necessity of legislation and provide our recommendations to the committee with regard to fitness, antitrust, insulation from political influence, and consumer protection.

Mr. Chairman, I appeared before your committee back in 1981 in July when you had before you the sunset of the Civil Aeronautics Board on a more expedited basis. At that time we voiced our concern along a similar line, on financial fitness, political insulation, consumer protection, and now we also want to add to that antitrust immunity as well as continuing protection insofar as preemption by the Federal authorities is concerned.

Our recommendations were set forth last time that there should continue to be a financial fitness finding. We proposed at that time because of the elimination of that requirement under the Regulatory Reform Act that section 604 be amended to vest in the Administrator of the FAA the authority for making a financial fitness finding.

We have included as part of this testimony a revised amendment to section 604 which is labeled exhibit 1 which would not only cover the financial fitness, but it will also include managerial expertise as well as other safety items.

We believe, as we believed then, that it is essential that carriers continue to be subjected to a financial fitness test as ones who cannot qualify may cause irreparable harm not only to the consuming public, but also to other airlines who are operating by detracting from the very solid reputations that they have today.

We also at that last time discussed political insulation. Since that time there have been many discussions of political insulation and how it should be achieved. The Department of Transportation conducted a seminar which all the parties of interest participated in. The conclusions or the summary of that was set forth by the moderator of the conference as follows:

First, a quasi-judicial process presided over by an administrative law judge developing a record and making a specific recommendation as regards the awards should be part of the system;

Second, the final decision based upon such recommendations being made by a Senate-confirmed Presidential appointee wholly and regularly concerned with international aviation matters; and

Third, with the Secretary accepting the oversight responsibility for effective execution of the process which would be manifest in acceptance of the Administrator's decision or a remanding of such decision.

I think it fair to say, Mr. Chairman, although it wasn't set forth in the summary by the moderator, many of those appearing recommended, in lieu of the Administrator, a panel possibly of three people who they felt would be able to provide for better insulation than a single administrator.

We believe the insulation process has several different aspects; evidentiary insulation which goes to the procedural rules ex parte and how the proceeding is conducted; tenure insulation which would insure that the individual who is going to make the decision, or the panel that is going to make the decision has tenure so he cannot be removed at will; and, third, review insulation so that the review criteria is set forth in advance—what the prerogatives of the review party or parties are.

When we speak about political insulation, we are not talking about merely in this case the award of routes. We believe that the other actions where adjudicatory proceedings are required, such as EAS decisions, complaints under the International Air Transportation Fare Competitive Practices Act, and so forth, all could be included within the activity that that Administrator or panel would be responsible for.

We recommended continuing consumer protection as put, last appearance as we saw it at that time, we believe consumer protection should go to the FTC. We have changed our minds on that and we believe it should go to DOT.

We believe that there is a continuing need to keep as much of the activity of the CAB in one entity as possible. Since the DOT will handle international as well as continuing domestic functions, if you do indeed continue them by legislation, such as the financial fitness, consumer protection and others, should also be vested in that same agency.

Carriers who operate both domestic and international services shouldn't have to be handled on consumer complaints internationally by the DOT and then by the FTC on domestic.

We believe that the activity that has been conducted by the CAB, while we recommended and did support deregulation and the elimination of the Board per se, is a necessity to maintain a nucleus to continue to administer the remaining functions that will endure, and we do support the legislation and the need for immediate legislation to properly sunset the Board and to include the many items, including specific provisions set forth, and that we do have Federal preemption to preclude the States from involving that antitrust immunity vested in DOT and not in DOJ.

We believe again that DOT is much more capable of administering those functions. They should have expertise that they will obtain from the Board through the transfer process which should insure a consolidated activity so that one has one place to go for aviation.

But I would say in the reverse, and I have heard many witnesses say it, Mr. Chairman, I just don't understand why everybody says we must disperse this activity so that it never arises again. It has been good and it has provided the United States with a sound air transportation system. We are going to have to continue to do it if we are to have a sound international system, which is essential not only for transportation purposes per se, but for defense purposes as well.

Therefore, we need something strong to guide and aid in the development of that international arena, and we believe it has to be an entity that exists and not fragment it throughout the entire Government that one can never find who is ultimately responsible and who is responsible for aiding and abetting transportation in developing and continuing to serve the various ends that the Congress intends it to serve.

That concludes my statement, Mr. Chairman, and we thank you for permission to appear.

Mr. MINETA. Thank you very much, Mr. Driscoll.

You suggest a continuation of a finding of financial fitness prior to issuing a certificate to a new carrier.

Mr. DRISCOLL. Yes, sir.

Mr. MINETA. And you say that FAA should have this responsibility. I, too, believe fitness should be determined beyond safety, but I question whether FAA is best equipped to perform this function. Would this function be better performed at DOT?

Mr. DRISCOLL. The answer has to be yes, Mr. Chairman. We made this suggestion last year and we make it again this year because we did not feel that the 401 authority would transfer or that DOT would have any such responsibility.

Therefore, this was sort of a makeshift way of trying to insure that the Administrator of the FAA would still exercise some kind of financial fitness, and I believe this was developed through an exchange between Mr. Snyder and myself when I appeared in 1981 where he even suggested that the certificate that was issued should also be called a certificate of public convenience and necessity so that there wouldn't be a challenge to it by a State, since there was no longer a certificate of that nature.

Mr. MINETA. Now yesterday the former Chairman of the CAB, Mr. Cohen, said that unless there was a collegial, multimember body making international route awards, the notion of Government in the sunshine and its advantages to decisionmaking would be lost.

Would you concur with Mr. Cohen that decisionmaking by a single individual in an area such as international route awards would be government in the dark?

Mr. DRISCOLL. I believe it would. I also believe, Mr. Chairman, that if you took the Department of Transportation plan to use a career civil servant and to say that is insulation and he can make a decision and he has no possible interference by anyone, I have to raise the question who makes out his efficiency report and who determines whether he is eligible for a bonus, who determines whether he gets a promotion and who determines, I think as you suggested, whether he is transferred up to Alaska for the removal of ice from some ship?

Mr. MINETA. Now you support a collegial body for international decisionmaking. Would you vest this same body with the authority to grant antitrust immunity to industry agreements or do you envision that being handled within the current DOT structure?

Mr. DRISCOLL. I would vest it with the collegial body.

Mr. MINETA. Now your position is that DOT should have the authority to grant antitrust immunity. Yesterday we had Mr. McGrath of the Department of Justice before us and he told us that Justice would be reasonable and would consider transportation benefits in looking at agreements and look beyond the impact on competition of an agreement.

Did Mr. McGrath's statement, if you were here in the room, assuage your concerns at all about having these functions lodged at the Department of Justice?

Mr. DRISCOLL. No, sir, I wasn't here in the room. I have read his statement. But I do know some of the people that work in the antitrust division there and they are very fine people at Justice and I believe they could add and would probably administer any function they had as best they could under the guidelines that Justice would impose.

I believe that the people who are going to judge whether or not there should be antitrust immunity should be those that have knowledge and a specific responsibility for the transportation entities involved. I don't think you can do it in the dark.

Mr. MINETA. Very good. Thank you very much, Mr. Driscoll.

Mr. Packard.

Mr. PACKARD. Thank you, Mr. Chairman.

Mr. Driscoll, would you outline for me those air carriers that belong to your association.

Mr. DRISCOLL. There are two principally, the Transamerica Airlines, formerly Transinternational Airlines of California and World Airways of California.

Mr. PACKARD. It doesn't represent a broad base of carriers?

Mr. DRISCOLL. We have represented a broad base of the charter industry, sir. There are many charter carriers that we speak for from time to time. The charter industry has, I guess, disintegrated and become scheduled carriers and is reforming now as new charter carriers come forward.

We do service a lot of those under our facility at Chicago, about 12. However, they have not seen fit to or been able to afford joining in an association, although we do speak for them at various times gratuitously.

We also do speak for several air freight forwarders and also several airports that we represent in bilateral matters.

Mr. PACKARD. Thank you.

You concluded in your testimony, Mr. Driscoll, that there is a dire need for legislation to correctly sunset the Civil Aeronautics Board. What do you think would be the most significant problems if we don't have legislation to bring about the sunset?

Mr. DRISCOLL. I think there would be several, Mr. Chairman. One would be financial fitness. There would be no longer any test on that. I believe Mr. Jim Burnley, yesterday appearing before your committee, admitted they would not at DOT or FAA get into a specific financial fitness or managerial fitness finding.

Two, political insulation. If you don't have legislation, you are going to have the system that was proposed and would be set forth in a proposed rule by DOT.

We feel that the provisions that should govern the administration of how international aviation as well as whatever domestic functions you determine to continue should be legislatively mandated and not mandated by the agency that is going to administer them.

Mr. **Packard**. Thank you.

You heard my question earlier to Mr. Lazarus representing United Airlines regarding the concept of having the basic responsibility of the CAB transferred to DOT, and your testimony strongly recommends that those basic responsibilities would fall under the total umbrella of the DOT.

Why in your judgment do we see a major airline like United contrasting with the airlines or the air carriers that you represent in your association? Why is there such a difference in thinking on this issue?

Mr. **Driscoll**. Well, maybe size is one way of determining it. If you are large, you have a better way of fighting in the world, I guess. We have some bitter experience.

Mr. Chairman, I have represented charter air carriers going back probably 17 to 20 years. We have had large groups and some have come and some have gone by the wayside. We have had a terrific fight all the way through the regulatory process in trying to maintain the smaller carrier in existence.

We have examples where World Airways, who is now a scheduled carrier serving internationally and domestically, was 10 years trying to get a certificate from the Board under very restrictive rules and regulations.

But the regulations have been changed and the Congress has mandated how they should be handled insofar as international is concerned. We would like to make sure that when you apply in a limited-entry market for a certificate, and surely some of the carriers will be applying again, there is a body who is going to administer that section as fairly as they possibly can to make sure that the small as well as the large have equal opportunity.

Now we are not trying to cast aspersions on any one single individual that might be given the responsibility. People that are in government today that we work with daily we have the utmost confidence in, but no one knows what the future may be.

If an agency is able to set its own rules, when a new Secretary takes over at DOT, what rules are they going to adopt? The same that are in existence or different rules? We think they should be legislatively mandated and we think there should be a system in being that the Congress has oversight responsibility for specifically and that it has set up itself.

Mr. **Packard**. Do you have the same concerns that Mr. Lazarus had in terms of perpetuating the large bureaucracy and problems that now exist in CAB?

Mr. **Driscoll**. I don't believe so, sir. Given proper parameters and proper oversight by the Congress, you can preclude people from getting too large as you have done in other areas.

I think any agency only gets larger if it has the will of Congress to assist it in getting large. I have been in and out of government for a long time and I have seen it happen in various agencies and I don't think I share his concern of it mushrooming itself.

Mr. **Packard**. Thank you, Mr. Chairman.

Mr. MINETA. Mr. Driscoll, thank you very much for your very fine statement. We appreciate it.

Mr. DRISCOLL. Thank you, sir.

Mr. MINETA. I now call forward a panel made up of Ms. Linda A. Puchala, president of the Association of Flight Attendants, AFL-CIO; Capt. Henry Duffy, president of the Air Line Pilots Association, and Mr. William G. Mahoney, on behalf of the Brotherhood of Railway & Airline Clerks, Flight Engineers' International Association, International Association of Machinists & Aerospace Workers and the Air Transport Workers Union of America.

The full text of your prepared statements will appear in the record at this point.

[Statements referred to follow:]

STATEMENT BY

LINDA A. PUCHALA
PRESIDENT
THE ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO

My name is Linda Puchala. I am President of the Association of Flight Attendants, the largest flight attendant union in the United States, representing approximately 21,000 flight attendants employed by 14 carriers.

I appreciate the opportunity to present our concerns about the upcoming sunset of the Civil Aeronautics Board (CAB) and the uncertain future of several critical functions currently performed by that agency. Title XVI of the Airline Deregulation Act specifies transfer to other agencies of only certain limited CAB functions at sunset. Other responsibilities, however, absent any mandated transfer, may fall victim to the uncertain future of "administrative transfer." Despite the Department of Transportation (DOT) plan to perform many of these functions under existing authority, we fear that authority could be legally challenged in some cases. In other cases, important CAB functions may be deliberately dropped or weakened.

Therefore the Association of Flight Attendants urges legislation which clearly transfers certain critical CAB functions, to preserve both the rights of airline workers, and the continued safety of the industry after sunset.

Specifically, we urge that such legislation address the following concerns:

(1) Codification of standard Labor Protection Provisions (LPPs), which have been routinely required by the CAB as a condition of approving major airline mergers, and a mandate that such LPPs be

required by the Justice Department as a condition of future airline mergers.

(2) Transfer of the CAB's current role in determining the fitness of new carriers.

(3) Assure continuance of FAA authority to regulate airport security.

(4) Transfer of the CAB's current authority for making and enforcing smoking rules.

(5) Transfer of the CAB's current data collection function and airline reporting requirements to the DOT.

(6) Maintenance of CAB funding through December 31, 1984 and transfer of the CAB's current staffing levels to the successor agencies, to assure the orderly continuance of vital functions.

I will address each of these concerns.

1. CAB Sunset Legislation Should Codify Standard Labor Protection Provisions (LPPs) And Mandate That The Department Of Justice Impose Such LPPs As A Condition Of Future Airline Mergers. Section 408 of the Federal Aviation Act provides procedures for approval or disapproval of mergers, consolidations and the like through which a myriad of public interest and antitrust considerations may be aired. At sunset, the Board's authority under Section 408 is slated to be transferred to the Department of Justice.

In carrying out its responsibilities under Section 408, the Board has generally imposed LPPs as a condition of approval of consolidations involving Section 401-certificated carriers in order to ameliorate the disruptive impact upon employees resulting from the merger. These LPPs typically provide an orderly procedure for integrating the seniority lists of the two merging employee groups, certain minimal economic benefits to employees who lost their jobs or who were downgraded or otherwise displaced due to the merger, and binding arbitration to resolve any disputes regarding these provisions. Those imposed since the 1972 Allegheny-Mohawk merger have provided the standard for subsequent LPPs. Since 1950, the CAB has imposed LPPs as a condition of approval in approximately 43 Section 408 cases, most recently in the 1982 Bergt-AIA-Wien-Western acquisition case.

Continued imposition of LPPs is consistent with deregulation. The 1978 Deregulation Act clarified congressional intent to maintain and expand airline employee protections by amending the public interest standard of the Federal Aviation Act to specifically include "the need to encourage fair wages and equitable working conditions" (Sec. 102(a)(3)). In major merger or acquisition cases involving certificated carriers since deregulation, the CAB has generally concluded that the public interest requires LPPs and has conditioned approval for the transaction upon the imposition of provisions similar to Allegheny-Mohawk LPPs

Illustrative of the Board's reasoning are the conclusions of Administrative Law Judge Joseph J. Saunders in the North Central-Southern Merger case, the first merger before the Board following passage of the Deregulation Act:

> "In a long line of merger cases, the Board has invoked this authority [to impose conditions on mergers] to afford protection to

> air carrier employees who would be adversely affected by the consolidations. The Board had recognized that the integration of facilities and work forces in connection with a merger frequently causes dislocations and hardships to employees and that employee dissatisfaction about these matters may lead to work stoppages and consequent disruptions of air transportation services. Thus, the labor protective provisions were developed to ameliorate the impact upon labor of the dislocations, transfers, and dismissals which may occur in the wake of a merger. The Deregulation Act made no change in the language of Section 408(b) concerning the Board's authority to impose terms and conditions in merger cases."1/

The Deregulation Act's emphasis on employee protection extends even beyond this expansion of the public interest standard. The Act further expresses congressional intent to provide for labor some basic protections from the upheavals of deregulation. Section 43 specifies that for ten years following the passage of the Act, certain career airline employees who were furloughed would receive hiring preference from other carriers, and monetary benefits if the CAB determined that deregulation was a major cause of their displacement.

Unfortunately, this congressional mandate to protect the interests of airline employees has been sadly thwarted -- final regulations implementing the first right of hire were not issued until last September and became effective only this month; the CAB has just begun the pre-hearing stage to determine whether

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1/ Recommended Decision in North Central-Southern Merger case, Docket 33136, dated February 9, 1979, pages 78-79.

employment contractions on nine airlines are attributable to deregulation; the mandated displacement allowances have never been funded.

Despite this dismal record of implementing Section 43 programs, Congress clearly intended that labor protections were not only consistent with deregulation, but should be an integral part of the industry's new deregulated environment. Because these Section 43 programs have been impeded, merger LPPs become an even more critical element in promoting both the public interest and equity for airline employees in the deregulated environment.

LPPs are consistent with the existing statutory framework of airline labor relations management. The federal government has much more direct involvement in critical aspects of airline (and railroad) labor relations than in other industries. The central theme of federal labor policy in the airline industry is the avoidance of interruptions to the flow of traffic. Because of the great public interest in a transportation system free from labor disruption, Congress enacted the Railway Labor Act to provide a format for labor-management relations in these industries which markedly differs from the scheme applied to almost all other industries. For example, while collective bargaining agreements in other industries "terminate" on specific dates set forth in the agreements, airline labor agreements have "amendable" dates, and they continue in effect past the amendable dates until modified in accordance with statutory provisions. The timetable for "termination" is largely controlled by the federal government through the National Mediation Board. In addition, Congress has placed numerous roadblocks in the path of labor and management serving to greatly restrict the right to engage in self help, e.g., strikes and lockouts, which are not imposed in other industries. The Railway Labor Act's status quo provisions, prohibiting unilateral changes or self-help until an agreement has been reached or the parties have been "released" by the National Mediation Board to engage in self-help, and a "cooling off" period has expired, have often led to extremely protracted negotiations and mediations, sometimes lasting for several years.

The merger of two or more air carriers necessarily alters the status quo. Its unsettling and significant impact upon employees of the carriers involved, with possible reductions in force, involuntary relocations, and rearrangement of working conditions, threatens the very type of labor disruption which congress has so carefully sought to avoid. LPPs, by alleviating a merger's impact on the employees, reduce labor disruption and thereby serves the public interest.

LPPs cannot be left to the negotiations process. There are several important and practical reasons why merger-related employee matters, including LPPs, cannot be resolved through collective bargaining.

Under the Federal Aviation Act and the Deregulation Act, airline mergers or acquisitions cannot be approved if they are not in the public interest. Presumably, a determination that a particular merger or acquisition is in the public interest carries with it the notion that the public is better served by combining the operations of the carriers involved rather than having them operate separately. However, a combination of operations presents a number of problems, some involving the affected employees. In most instances, the employees of the respective carriers to the merger or acquisition each have their own established seniority lists and other working conditions. Prompt integration of the separate workforces is essential for effective blending of the operations, yet the probability of this occurring if the matter is left entirely to negotiations under the Railway Labor Act is extremely low in light of the previously described extensive delays built into the statutory bargaining process. Under the statute, seniority integration could not be accomplished until agreement is reached or the processes of the Act are exhausted. The so-called "standard LPPs" attached to airline mergers provide the alternative solution to the problem by supplying a specific mechanism for integrating seniority lists, including resort to arbitration if necessary.

Even if a carrier was willing, through negotiations, to commit to LPPs in the event it was involved in a merger or acquisition -- and many carriers have been unwilling to do so to date -- that would not solve the problems presented. For example, if one carrier with negotiated LPPs merged with another carrier without negotiated LPPs, which rules would govern? Throw in the added factor -- which has been present in each post-deregulation merger -- that different unions represent a particular employee group, e.g., flight attendants or agents, on the merging carriers, and the prospect for uncertainty, disruption and above all DELAY becomes a foregone conclusion. Again, such results do not serve the public interest.

The public interest benefits of LPPs apply not only to airline employees, but also to the air carriers themselves who are parties to airline mergers. Airline managements have often recognized the critical importance of LPPs and welcomed their imposition. Thus, for example, Dominic Renda, President of Western at the time of the proposed Continental-Western mergers, strongly endorsed the imposition of LPPs:

> Q. In your opinion, and in your experience in the management of airlines, are labor protective provisions beneficial only for labor, or are they beneficial also for management?
>
> Mr. Renda: In my judgment, a reasonable labor protective provision is essential to both sides, in terms of the employees. It gives them the protection which I believe they are entitled to. In the case of a company, it provides them with the opportunity to rely on the dedication, the loyalty, and the moral support of the employees which you must have in order to get the productivity that is essential." Continental-Western Merger Case, Docket 33465, Transcript, p. 179.

Similarly emphatic were the comments of the chief industrial relations official for Republic Airlines, the acquiring carrier in the Republic-Hughes Airwest Acquisition Case:

> "It is my view that labor protective provisions are fair to Republic and to the employees of both companies. Indeed, they are more than fair. They

> are absolutely necessary if there is to be a successful integration of employees in an industry such as this.
>
> * * *
>
> "Absent the labor protective provisions, I have serious doubts whether many past consolidations in the industry would have been possible.
>
> * * *
>
> "We may all tend to take labor protective provisions for granted at times, but it is useful to step back occasionally and consider what would happen if they were not there - and also to evaluate the advantages of their application. Everyone can be thankful that the provisions are there and will be continued in the future."2/

For the reasons set forth above, we urge that the CAB Sunset legislation require that standard LPPs, although minimal in scope, be imposed by the Department of Justice as a condition of any mergers, acquisitions, consolidations, or other combinations of air carriers, regardless of the size of the carriers involved. This, of course, would merely continue the practice which has routinely applied to major mergers or acquisitions approved by the CAB since 1950. For similar reasons, this would place no new roadblocks in the path of carriers desiring to merge.

2/ Testimony of Gowan J. Miller, Vice President-Industrial Relations, Republic Airlines, Inc., Exhibit RC-401, pp. 5, 6, 7.

While parties should be free to negotiate with regard to LPPs, the employees should be assured they will receive no less than the minimal protections set forth in the standard LPPs.

Contrary to the fears of certain LPP critics, the statutory requirement of LPPs need not result in any increased federal government activity, since interpretation, application or enforcement of LPPs can be accomplished without the direct involvement of governmental agencies. Section 13 of the standard LPPs provides for resolution of disputes or controversies arising with respect to LPPs by an arbitrator selected from a panel of seven (7) names furnished by the National Mediation Board subject to the parties' right to agree upon another method of dispute resolution or selection of an arbitrator. These procedures can be utilized to resolve all issues related to the LPPs, including whether the LPPs are applicable to the particular controversy. No governmental agency would be required to be involved except for the mediation board's provision of a panel of arbitrators, where necessary. This is a role the mediation board plays on an ongoing basis in fulfilling its obligations under the Railway Labor Act.

AFA has testified repeatedly over the last few years on the need for statutory imposition of LPPs as a condition of CAB merger approval. This need becomes even more critical at CAB sunset, as merger approval authority under Section 408 transfers to an agency inexperienced in the consideration of airline worker rights.

2. Sunset Legislation Should Mandate That Section 401 Fitness Determinations Be Continued By the Department of Transportation. Section 401 of the Federal Aviation Act requires each airline applicant for initial certification must be found "fit, willing and able to perform properly the transportation covered by its application" and must continue to meet these requirements or be penalized by modification, suspension, or revocation of its operating certificate or other authority. At sunset the requirement for domestic new extrants to obtain a Section 401 certificate, and the prohibition of operating without one, both lapse. The 1978 Deregulation Act left intact the Board's responsibility to determine a carrier's managerial competence, financial fitness, and compliance disposition, but failed to specify that this important function would transfer to any other agency at sunset. We submit that this oversight should be remedied now through sunset legislation.

The legislative history of the deregulation act shows that Congress considered the CAB's fitness determination function to be even more critical after deregulation. Concerning this issue, the 1978 Senate Report of the Airline Deregulation Act stated on page 97:

> ". . .While there has never been a problem with the financial responsibility of scheduled carriers, the (deregulation) act significantly reduces barriers to entry into all forms of air transportation. Given the expected growth of the industry, the committee believes this section is desirable to insure that the Board will have ample authority to protect travelers and shippers from financial losses stemming from the operation or maintenance of aircraft."

The House Report also emphasized the importance of maintaining fitness standards to ensure a safe industry after deregulation. It recommends on page 95 that:

> ". . .An extraordinarily high degree of managerial attention and financial investment is required by air carriers to maintain the highest possible level of safety. Regulatory reform needs not adversely affect aviation safety, but it should be recognized that a change in the basic safety disposition of air carriers could be for the worse in a highly competitive atmosphere."

Fitness determinations are separate from and do not duplicate the FAA's safety investigations of new carriers. Under Section 604 of the Federal Aviation Act, the FAA now issues operating certificates based upon determination that the carrier applicant is properly and adequately equipped to operate in accordance with federal safety regulations. The agency only incidentally reviews the business characteristics of the applicant. The CAB fitness investigation, on the other hand, reviews the applicant to determine the adequacy of its financial resources, the competence of its key management, and that management's record of compliance with other federal laws and regulations.

The fitness determination requirement cannot be criticized as a barrier to entry, or as inappropriate in a deregulated, competitive industry. Since 1978 the Board has approved 115 carriers for certification and denied only three; several applications have been withdrawn, and more than 20 are pending. (Aviation Week and Space Technology, 1/9/84, p. 26).

The Board has not been overly aggressive in its fitness reviews, but a look at few applicants which were weeded out by the process will illustrate the importance of the fitness standards. The above-referenced Aviation Week reported that the Board recently reopened its fitness investigation of Regent Air because although the applicant had met the standards for financial fitness and managerial competence, the management's history of compliance with regard to federal laws and regulations was questionable. In addition to dealings with organized crime figures, management had complaints against them from the Securities and Exchange Commission. Other applicants have had little or no aviation experience, and in one case, now withdrawn, the carrier had tried to establish an airline with a negative net worth for tax purposes. Without a successor agency to continue the monitoring of these fitness standards, what will protect the public from airlines which may lack basic financial resources, managerial competence, and the compliance disposition to conduct safe and reliable operations?

The transfer to the DOT of current fitness determination procedures would also serve the public interest by continuing to provide a valuable forum for public involvement in the process. As in Section 408 merger cases, the current fitness determination procedures provide for formal consideration of relevant evidence and comments submitted by interested parties -- including other airlines or labor groups -- before a final decision is issued.

This results in both improved public access to the government's decision-making process, and a better informed decision.

The DOT Plan (DOT, Office of the Secretary, February 1984, p. 54) claims that after sunset the FAA, under Section 604 authority, can conduct a "complete and meaningful" review of carrier fitness, including financial and managerial matters, to the extent that they have a bearing on aviation safety. Nevertheless, we urge that sunset legislation should clearly vest the FAA with the authority to determine financial and managerial fitness, and it should mandate that the FAA judge fitness on those standards -- as well as the adequacy of equipment -- before issuing an operating certificate.

3. Sunset Legislation Should Ensure Continuance Of FAA Authority To Regulate Airport Security. The DOT Plan (p. 56) points out that the abolition of Section 401 at sunset calls into question the FAA's authority to regulate airport security, including the granting of exemptions from rules on screening passengers, and promulgating rules for protection of passengers and property from criminal violence. Such authority is now established by reference to "air carriers certificated by the Board." At sunset, this Board certification will cease.

Congress clearly did not intend to diminish air safety or the FAA's authority, and the DOT believes that it has sufficient broad authority to continue to regulate airport security. Nevertheless, we urge that CAB sunset legislation include clarifying amendments to the Federal Aviation Act to ensure the FAA's continued authority to regulate airport security.

4. Sunset Legislation Should Transfer The CAB's Current Authority To Promulgate And Enforce No-Smoking Rules. AFA has some concerns about the potential problems that could be created for flight attendants and passengers if the existing passenger protection rules under Section 404 are allowed to expire with sunset. These rules were developed over several decades and represent the CAB's expert judgment as to what protections passengers should be afforded in such areas as lost luggage, overbooking, and no-smoking. The existence of these rules creates consumer confidence in flying, avoids costly litigation, and reduces conflicts between passengers and airline employees.

Only one of these rules, however, directly impacts on our membership, and that is the no-smoking rule. AFA has compiled hundreds of reports from flight attendants who have experienced problems in breathing and discomfort in their eyes, nose, and throats. Many have experienced symptoms associated with oxygen deficiency during flight.

The cabin environment is an inhospitable one in terms of air quality. It is dry; it is polluted, particularly while taxiing; it can contain ozone; and it has very limited amounts of fresh air. To add smoke in such an environment merely adds insult to injury. Flight attendants do not just sit back in this environment. They work, and they work hard, walking back and forth in what some have described as a "blue haze."

We therefore support the continuation of federal oversight in this area, and we would recommend the transfer of whatever no-smoking rule the Board finally develops at the end of its current rulemaking process. We hope that the new no-smoking rule will prohibit smoking when the ventilation system is not "fully functioning" since many airlines now turn off portions of the ventilation system, known as "pacs" to conserve fuel during flight. Our flight attendants tell us that they experience particularly acute problems at this time.

The transfer of the no-smoking rule would have to be done by legislation since the rule is based on the "safe and adequate" service section (404(a)) of the Federal Aviation Act. Although some of the other passenger rules might conceivably be promulgated by the Federal Trade Commission under its "unfair and deceptive" authority, the no-smoking rule would have to have a separate legislative basis.

5. CAB Sunset Legislation Should Mandate the Present Level of Airline Reporting Requirements Be Retained By the DOT. Since deregulation, the CAB has reviewed its data collection needs and has dramatically reduced the number and detail of reports required to be filed by air carriers. For example, of the 73 financial, traffic, and accounting schedules comprising the Form 41 filed by air carriers in 1978, only 50 were required a year ago, and only about 25 are projected for retention after sunset. This reduction was spurred both by the CAB's declining need for data collection due to deregulation, and by the mandate of the

1980 Paperwork Reduction Act which required a 25% decline in private sector reporting burdens by the end of fiscal 1983, on an agency-by-agency basis.

In order to determine the future of airline reporting requirements, in 1982 the Board conducted a cost-benefit analysis and reviewed public comments to its earlier recommendations on the future of airline data collection. Data users -- including other government agencies, trade and labor groups, air carriers, airports, and manufacturers -- confirmed that the current level of reports provide the only reliable, systematic source of much valuable economic data on the airline industry. From these studies the Board advised that, in general, the current level of CAB data collection should be continued by the DOT after Sunset. We applaud that decision.

The DOT states that it has both the intention and adequate existing authority to collect and disseminate necessary data. But statutory transfer of the current level of CAB data collection will provide the only guarantee that the present airline reporting requirements will continue. Without such a mandate, we risk the decline or disappearance of the data resources critical for informed decision making by the DOT, DOJ and other users in the industry.

6. Several Additional Concerns Warrant The Attention Of This Committee. Although you may have heard testimony on some of these issues at earlier hearings, I would like to add a few brief comments at this time.

First, we applaud the statutory transfer to the DOT of CAB authority for making determinations in the employee protection program under Section 43 of the Deregulation Act. A complaint was recently filed in the U.S. District Court of the District of Columbia (Airline Pilots Association, et al. v. Civil Aeronautics Board, Civil Action No. 83-3047), however, which raises questions of legality concerning the Board's handling of airline employee applications for determination of the major cause of their unemployment, pursuant to Section 43(h)(2) of the Act. These legal questions may not be resolved until after sunset, and their resolution may affect the disposition of cases currently in the early prehearing stages before the Board. Nevertheless, it is vital that the CAB's current authority to make those determinations be clearly transferred to the DOT, and that the DOT is prepared to continue hearing any pending cases without delay and to make prompt and objective determinations in any new cases that may arise in the remaining time of the ten-year program.

Second, the staffing levels at DOT and other successor agencies must be adequate to administer the new programs they will receive from the CAB. Approximately 350 CAB employees currently perform the functions that are mandated to continue after sunset. To meet these new complex responsibilities, successor agencies must be provided at least this many additional staff. In fact, more personnel should be allocated if additional CAB functions are continued after sunset.

Finally, supplemental appropriations must be passed to fund the CAB through August and September of this year. Due to a compromise in last year's appropriations conference, the CAB will have to shut down in August in the unlikely event that supplemental funding is not provided before then. This would not only short-circuit the orderly transition toward Sunset, but it would paralyze the industry, leaving the airlines and the traveling public with no agency having statutory authority to deal with a myriad of problems including essential air service, route and fare changes, carrier fitness, or consumer issues.

In conclusion, we believe that sunset legislation is vital in order to provide clear statutory authority for continuing many important functions currently performed by the CAB, and to assure that these programs are neither weakened nor eliminated by successor agencies. The legislation is needed to correct serious omissions in the deregulation act's sunset provisions which jeopardize safety and future public confidence in the industry.

Thank you for this opportunity to present our concerns. I will be happy to answer any questions you may have.

STATEMENT OF
HENRY A. DUFFY, PRESIDENT
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL
BEFORE THE
SUBCOMMITTEE ON AVIATION
OF THE
COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION
U.S. HOUSE OF REPRESENTATIVES
MARCH, 1984

SUNSET OF THE CIVIL AERONAUTICS BOARD

Mr. Chairman and members of the Subcommittee, I am Henry A. Duffy, President of the Air Line Pilots Association, International (ALPA) representing 34,000 airline pilots. Thank you for the opportunity to present our views.

Sunset of the Civil Aeronautics Board is an objective which ALPA can happily anticipate. The Board under its recent leadership has long outlived its usefulness. Its functions should be transferred to a permanent home with a permanent staff and mandate -- the sooner the better. But I realize that the issue here is not whether to close the Board, but whether new legislation is necessary to achieve that now-inevitable end without loss of valuable functions and without other dislocations and problems.

I will not repeat my testimony of last Summer before this committee concerning the serious need to address legislatively the long-term financial problems of many carriers in this industry. You've already heard all I have to say on that subject. I will also not dwell long on ALPA's preference for transfer of these functions to a new agency. I will only pause to convey to you our distress at the poor quality of forum the CAB has been -- with no promised procedural reform or improvement either at DOT or DOJ. Whatever the structural framework of the governmental body which takes over these functions, it is vital that procedures be devised which are open and fair to intervenors as well as to applicants. That structure should also have an ultimate decision-maker in litigated cases who is sufficiently isolated from influence as to permit objective decisions on the basis of a hearing record. We are not satisfied that either DOT's or DOJ's plan goes far enough to assure that result. We would prefer to see an independent panel make final decisions, even if the initiating order, defining policy goals, is written under the authority of the Secretary. (The DOT has also yet to address satisfactorily the special situation concerning certifications yet to be made under the Deregulation Act Employee Protection Program. The DOT has already taken a position at the CAB against every certification necessary to permit payments under the program.)

Today I want to address four other areas of particular concern which need legislative attention when the CAB sunsets. These four areas are,

1. Mergers and acquisitions, and seniority protection
2. Fitness and safety
3. Preservation of data collection.
4. Consumer Protection

1. Antitrust, Mergers, Acquisitions, and Seniority Protection

As presently anticipated, mergers, acquisitions, route transfers, and similiar agreements will be regulated by DOJ (Sections 408, 409, 412 and 414). To some extent DOT will be involved (Section 401) insofar as transfer of international routes are at issue. According to DOT, the Federal Trade

Commission under Section 5 of the FTC Act will also have jurisdiction if domestic routes are at issue. (No resolution has been suggested of what becomes of the Board's Clayton Act enforcement powers under Section 11 of that Act.) This makes no sense at all. It is ALPA's view that statutory authority should be consolidated in one agency or department. If no new agency is created, the authority should be given to DOT as the Department whose mission it is to regulate the international air transportation system in the public interest. The DOJ has too narrow a focus on one set of issues (the antitrust laws) in a broad range of industries differing radically from air transportation.

ALPA has a high interest in mergers and acquisitions. They usually affect our members in serious, and potentially very adverse ways. Historically, many of the worst aspects of these effects have been forestalled through the use of labor protective provisions (LPP's) in a formula last changed in the Allegheny-Mohawk Merger Case at the CAB.

Allegheny-Mohawk LPP's have been imposed by the CAB these last 35 years in various settings such as route transfers, suspension-substitutions, mergers, acquisitions, etc. Prior to the deregulation-era the Board imposed LPP's in all 2-carrier mergers and acquisitions automatically, upon their presumed necessity, without any further, required evidentiary showing. Since then, various, shifting evidentiary requirements have been suggested. But all two-carrier mergers and most acquisitions have been approved with LPP's upon agreement of the companies involved. These LPP's have been refused in other kinds of transaction in the deregulation era on the basis of "discretionary" standards in individual cases. These standards often showed the same unreasoning hostility to employee interests as had some of the dicta in cases imposing LPP's in merger cases. In our view, legislation should be enacted to assure that mergers and acquisitions will remain subject to LPP's without the necessity to meet the intellectually sterile standards suggested in CAB dicta.

There are essentially two kinds of protection for employees in the LPP's, one procedural, and the other compensatory. The compensatory provisions have resulted in very little compensation over 35 years for pilots. In any event, compensation can be negotiated in collective bargaining, to one degree or another. However, seniority protection cannot so easily be assured by contract. It is very difficult to protect seniority by contract with a company which may not survive a merger -- particularly when the other company which is party to the merger may have a conflicting collective bargaining agreement with *its* pilots. Labor law has also made it very chancy to predict what would occur if both predecessor companies disappeared into a third, new company following merger.

Without LPP seniority protection, seniority questions might be left to decision by the relative power positions of the various employee groups involved, or to whatever protection may remain under internal union procedures. Accordingly, one group might impose a combined seniority list which places the other at the bottom. (In fact this has occurred before the CAB intervened in at least one case.) Without LPP seniority protection, long-time employees could have their careers abruptly terminated or downgraded. It is also not happenstance that there has been 35 years of labor peace during mergers and acquisitions in the airline industry, a record almost certain to end if LPP seniority protection ends.

Similarly, in an "acquisition" (which can also take the form of corporate reorganization to create a second airline under common control) we have the same kinds of concerns for employees of the weaker group or of the acquired company. One group of employees may be preferred over the other, to the latter's significant economic harm. Seniority protection in these circumstances provides a flexible solution. Under existing case-law, seniority lists can be maintained separately, unless there is agreement with all affected groups to merge, or there is harm to one group, resulting from the common control, which is provable to the satisfaction of an arbitrator. See Acquisition of Control by Air Florida System, Inc. of Western Air Lines, Inc., Order 81-9-25, p.13 (Show Cause); aff'd, Order 82-1-148 (Final Order).

There are a number of additional issues of detail concerning LPP seniority protection. However, our strongly held view is that at least the following should be secured by legislation before the Sunset of the CAB:

1. Seniority protection to be imposed in all airline mergers and acquisitions involving another air carrier, without an evidentiary requirement and whether or not there is opposition from the applicants.

2. Drafting which provides clearly and unambiguously that any transaction which is functionally like a merger or acquisition will be covered by LPP seniority protection even if the transaction takes another technical form.

If these two objectives can be accomplished, ALPA will view its most vital concerns to have been satisfied regarding employee protection.

2. Fitness and Safety

As things stand, the Sunset of the CAB will mean elimination of a separate "fitness" test for new domestic air carriers. The Board's examination of an applicant's financial and managerial capability is in addition to the Federal Aviation Administration's examination to assure compliance with its safety regulations.

The FAA's examination is by no means duplicative. The FAA does not conduct any detailed evaluation of a prospective airline's financial condition, managerial skills or disposition to comply with federal regulations. These factors need to be considered carefully, in our view, before any new entrepreneur gains access to our nation's airports and airways.

Furthermore, it is clear that FAA regulations set only minimum safety standards for the airline industry. The established carriers operate at their own standards, which are much higher than those prescribed by the FAA. Doing so requires a large investment of money and managerial talent on the part of the established airlines. We are fortunate they have made that investment because the FAA relies heavily on these airlines themselves to ensure compliance with federal safety regulations. But we cannot afford to forget that the FAA's safety authority provides only a limited safeguard. For, as we enter an increasingly deregulated environment, the hazards more likely to be created by fledgling airlines will warrant increased, not decreased, vigilance by the government. The dimension of this challenge is shown by the increase in the number of air carriers holding certificates from the FAA under Part 121 of the FARs. There were 50 in 1978. As of the Fall of 1983 there were 150-170. We are informed that pending applications number more than 100.

Fitness screening is indispensable, and the Board has not done the job which needs to be done. However, that is not a reason to do nothing at all.

The framers of the Deregulation Act, including many members of this Committee, clearly intended deregulation to have no adverse affect on air safety. As this Committee said in its report: "The policy statement makes clear that increased competition must not result in any deterioration in safety. The Board is directed to give the highest priority in maintaining safety and to preventing deterioration in established safety procedures" (p. 6, House Report No. 95-1211, May 19, 1978).

The Declaration of Policy in the Deregulation Act states in pertinent part that "the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

> "(1) The assignment and maintenance of safety as the highest priority in air commerce, and prior to the authorization of new air transportation services, full evaluation of the recommendations of the Secretary of Transportation on the safety implications of such new services . . . .
>
> "(2) The prevention of any deterioration in established safety procedures, recognizing the clear intent, encouragement, and dedication of the Congress to the furtherance of the highest degree of safety in air transportation and air commerce, and the maintenance of the safety vigilance that has evolved within air transportation and air commerce and has come to be expected by the traveling and shipping public."

Congress recognized the possibility that deregulation might enable new carriers with questionable safety capabilities to serve the public. In making this charge to the Board, Congress also tacitly recognized that the FAA's licensing procedures for air carriers were not enough to assure the required level of safety. With the demise of the CAB, the safety of the traveling public requires that the critical tests of carrier fitness be continued, and be continued in a form which is meaningful.

Under CAB practice, each applicant must go through an open hearing process before an ALJ. That inquiry permits discovery and cross-examination as well as an independent forum before an ALJ. This policy has not been honored consistently by the Board. However, it is an indispensable task --one which the FAA cannot and will not perform so well (ALPA's criticism of the CAB's fitness procedures notwithstanding). Even assuming that the FAA could change its regulations to require a certain standard of management expertise, financial wherewithal, and compliance disposition, there is no adjudicatory forum at the FAA where third-party intervenors may present evidence, cross-examine and conduct discovery, under the protective eye of an independent judge. ALPA v. CAB, 667 F.2d 181, 188, n.52 (D.C. Cir. 1981).

DOT has recently decided to increase the FAA's force of inspectors. We applaud that decision. But an army of new inspectors (this planned increase is not an army) at best will impact ongoing operations by already certificated carriers. It will fail to replace fitness hearings to screen new carriers in an open process to develop and test facts. If fitness issues are downgraded to be an element of the FAA's paper-work process during certification, all facts pertinent to the issues will remain forever hidden from challenge by anyone outside FAA. Such a procedure will not assure the requisite high level of safety for new entrants. If the DOT is really serious about upgrading the safety of new entrants, it should support transfer from the CAB of the fitness hearing function, and use those hearings as a form of review and control of FAA certification -- utilizing the safety expertise of that agency. Procedural short cuts are not sound policy. It is worthy of mention that Air Illinois, a newly certificated carrier in operation less than a year when it shut down for massive safety problems, was granted a fitness review by the CAB in a "show cause" order without review by an ALJ in an open hearing. (See Order 82-12-43) What the public needs is greater protective scrutiny of new carriers and not further procedural corner-cutting which exposes us all to unsafe, inexperienced and incompetent new air operations. Moreover, a fitness review which has broader scope, to protect the public from fraud or simply from financial failure, may not be within the FAA's statutory jurisdiction. Public confidence in air transportation will not survive for long if these remaining safeguards are lost.

It would be much preferable to transfer present CAB jurisdiction over fitness determinations to DOT, making clear that better, more stringent reviews which combine CAB and FAA concerns should take place in proceedings at DOT, subject to public hearings. As things stand, moreover, no new FAA rulemaking has been described or announced to correct the myriad anomalies which its regulations will now contain with the Sunset of the CAB. For example:

1. Correction of FAA regulations which refer to sunsetting CAB functions such as certificates of public convenience and necessity.

2. Clarification of enforcement and oversight assignments in the different FAA regions for commonly owned or controlled air carriers using common or interchanged facilities.

3. Establishment of uniform management and financial standards for domestic and flag air carriers. (Present FARs apply only to supplemental air carriers and air taxies).

4. Supervision of transfers of certificated carriers which may have ceased operations to the control of persons who may not be able to meet qualifications required for an original certificate.

It is readily apparent that limitation and decentralization of the government's power to regulate air transportation will only hurt, and will not help, to maintain familiar safety standards.

3. Data Collection

ALPA is concerned that either through loss of domestic authority under Section 407, or through rulemaking, vital data collection will cease on Sunset of the CAB. The data now reported are useful for many important purposes.

For example, "Form 41" data is crucial to permit monitoring of continued financial fitness. Even a carrier found to have sufficient financial and managerial resources when starting up, can find that unprofitable operations may quickly drain capital away. Continued surveillance of a carrier's finances and operation helps point out potential problem carriers where safety concerns may arise. Not only carrier net losses, but maintenance and training expenditures well below average would be cause for concern that air safety is being given second priority.

Furthermore, good industry data is a necessary prerequisite for planning. For example, aircraft manufacture and airport construction are highly capital-intensive. Efficient development cannot be presumed in the future if decision-makers in these areas important to healthy growth of our industry are deprived of the information necessary to their decisions.

The industry structure which will develop in the deregulated air transportation industry is unpredictable. The below-cost pricing trends which have become widespread in the industry were unforeseen prior to deregulation, and such trends are difficult to predict. Industry observers, particularly the academic community, must have full access to complete and accurate data so that the course of deregulation can be charted. Not only the airline industry, but several other industries now being deregulated may be benefited by the scrutiny of such independent study.

The cost burden of ongoing data collection is minimal. Most large carriers have computer-generated reports developed which can be compiled each month or quarter with minimal effort. The smaller carriers entering the industry may have some start-up costs, but these are just the carriers which warrant the closest examination. The costs of reporting financial, traffic, and operation data by these carriers cannot be distinguished from the cost of producing appropriate training, maintenance manuals, etc. when starting an airline. These requirements have as common objectives the safety and sound management of the nation's air transportation system.

Collection of these data is not anti-competitive. These data have been gathered and made publicly available for the past five years of the deregulation era. Some changes have been made to aggregate data, particularly the service segment information, so that no airline will gain a competitive advantage on the basis of that information. During this period we have seen no evidence that any carrier gained an unfair advantage from either Form 41 or other CAB generated data.

For these reasons, we strongly support continued collection of airline data, either through the rulemaking process, if DOT is correct that it has all the statutory authority it needs, or through additional legislation if there is any doubt.

4. Consumer Protection Issues

The Department of Transportation has argued that no new legislation is needed to continue Federal protection of airline consumers, a protection which all parties can agree is vital to the reputation of this industry. However, it is at best unclear whether the Federal Trade Commission would acquire sufficient authority on CAB Sunset to assure continuation of familiar airline consumer protection programs. Just to cite the most prominent example of wishful thinking by DOT, they argue that Section 5 of the Federal Trade Commission Act will supplant Section 411 of the Federal Aviation Act, to control unfair and deceptive practices in domestic air transportation. To reach this conclusion, DOT construes the Airline Deregulation Act to have eliminated the exception to FTC jurisdiction for "air carriers and foreign air carriers subject to the Federal Aviation Act of 1958 . . ." The rationale for this construction is that the Congress could not have meant that exception to continue, at a time when regulation of domestic air transportation was being eliminated.

However, domestic regulation has not been cancelled. For example Sections 408, 409, and 412 of the Federal Aviation Act, are to continue in effect, to be administered by DOJ. These provisions all have "public interest" tests which distinguish regulation of mergers, acquisitions, agreements, etc. in the airline industry from that of other industries. Special regulation of the safety of domestic aviation under Title VI of the Act continues at FAA. Thus, domestic air carriers are to remain "subject to the Federal Aviation Act of 1958" for the foreseeable future. Routes and rates are not the only forms of activity "regulated" by the Federal Aviation Act.

Furthermore, it is also illogical to suggest that since the purpose of the Airline Deregulation Act is the reduction of regulation, the preservation of some forms of regulation (against "unfair and deceptive practices") is to be inferred, against the natural meaning of the statute. It would be just as reasonable to infer that such broad-based jurisdiction to regulate the industry should disappear at the Sunset of the CAB, as a part of the deregulation effort. Regulation to protect consumers and competition, is "regulation" nevertheless.

DOT's argument regarding its construction of the Federal Trade Commission Act should be compared to its argument regarding the survival of

Federal pre-emption after Sunset. Section 105(a)(1) of the Act pre-empts state regulation of carriers "having authority under Title IV of this Act to provide interstate air transportation." It is DOT's position, apparently, that carriers continue to be subject to the Federal Aviation Act, Title IV for purposes of pre-emption, but do not continue to be subject to the Federal Aviation Act for purposes of FTC jurisdiction.

The most reasonable construction of the Sunset provisions of the Airline Deregulation Act is that the Act meant precisely what it said. Under Section 1601(c), the CAB was to have stated their detailed opinion as to what functions should sunset, what functions should continue, and what revisions to the law might be required. It is perfectly clear that continuous legislative oversight was anticipated. The Airline Deregulation Act was not considered to be a finished product. Indeed, since the passage of the Deregulation Act in 1978 there have been further technical and substantive amendments to the Federal Aviation Act, including the International Air Transportation Competition Act of 1979 and the "War Risk" legislation in 1982.

Any fair reading of this history would draw from it the conclusion that if the Congress did not mean what it said in the Deregulation Act, the Congress had the opportunity and the will to change it.

It is ALPA's opinion that, without new legislation, FTC authority to regulate domestic air carriers will fail. This is a very undesirable thicket the DOT would have us all enter. It is undesirable for consumers, whose protection will rest on questionable authority. It is undesirable for the carriers, which may face a strong assertion of jurisdiction by the several states. It is undesirable for the future of the industry, which will suffer the weakened public confidence which will inevitably be bred by those circumstances.

It is ALPA's position that

1. Federal pre-emption of state regulations should be continued past Sunset -- with clear legislation for that purpose;

2. Authority to protect domestic airline consumers under Sections 411 and 404 should be continued; and or transferred to DOT, so that one central authority will be responsible, and so that artificial distinctions between international and domestic consumer protection do not plague the industry with jurisdictional and substantive conflicts.

* * * *

That completes my prepared statement Mr. Chairman. In closing, let me emphasize that there are many important issues which need to be addressed in legislation before the CAB sunsets, but there should be no more important concern than the need to protect airline employees, who have become the victims of the powerful forces let loose in the deregulation of our industry.

Thank you for this opportunity to present our views. We look forward to working with you for a safer and stronger industry.

STATEMENT OF
BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS,
FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION,
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
AND TRANSPORT WORKERS UNION OF AMERICA

BEFORE THE SUBCOMMITTEE ON AVIATION
OF THE
COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION
OF THE
UNITED STATES HOUSE OF REPRESENTATIVES

March 14, 1984

Mr. Chairman and Members of the Subcommittee:

My name is William G. Mahoney. I am a lawyer with the firm of Highsaw & Mahoney, P.C. with offices in Washington, D.C. I am appearing today on behalf of the Brotherhood of Railway and Airline Clerks, Flight Engineers International Association, International Association of Machinists and Aerospace Workers, and the Transport Workers Union of America. These unions and the many tens of thousands of employees represented by them in all crafts and classes on this nation's air carriers, express to you their appreciation for this opportunity to inform you of the tragic effects which have occurred to these employees because Congress thus far has failed in its commitment to protect these employees and their families from the devastating consequences of the Airline Deregulation Act of 1978.

We testified before you on May 23, 1983, at which time in addition to our oral testimony we presented a 29-page written statement together with numerous exhibits which demonstrated the failings and the failures of the Deregulation Act particularly with regard to its effects on employees.

We said then that despite the many thousands of employees unfortunate enough to have committed their lives to the air transport industry during or before 1978, and who had since lost their jobs or been forced to transfer, none had received the first penny of protection. It is now ten months later and those employees still haven't received protection and I say to you as sure as I sit here that under the prevailing conditions established by the Civil Aeronautics Board under Section 43 of the Airline Deregulation Act in the order of the Board attached to our May 1983 testimony and in a later October order of the Board, no employee will ever be protected.

I do not exaggerate in the least. What I say is based on my experience with this statute and my experience with the Civil Aeronautics Board in its administration of this statute and well over 30 years as a practicing lawyer.

I have attached as Appendix I to my testimony a copy of the October order of the Board which is designated CAB Order No. 83-10-29. I ask you to read pages 4, 5, 6 and 7. I, of course, haven't time to go into all of the matters discussed on those pages, but I would like to point out a couple of things.

As I first read Section 43 and each time I have read it since its enactment, I have concluded that what Congress had in mind as the central task for the Civil Aeronautics Board in this matter was that it was to conduct a factfinding process to determine first of all whether 7 1/2% of full time employees on a given air carrier had been laid off in a given year; and, second, to determine whether the major cause of that employee lay-off was the Airline Deregulation Act. It has always appeared clear to me at least, that all parties were to be required to provide the Board with whatever evidence was available and that the Board was to make its determination based upon that evidence. The Board, however, doesn't view it that way. The Board, in the two orders that I have referred to, placed an excessively restrictive interpretation upon Section 43 and concluded that Congress "thus intended for us to construe narrowly its definition of 'qualifying dislocation' in Section 43. To carry out this clear legislative intent, we must carefully limit our findings of qualifying dislocation to major contractions caused by the ADA and exclude employment declines resulting from regulatory activities which we implemented under the Federal Aviation Act as it existed prior to the ADA." (Emphasis supplied.) Now what that means is despite the myriad of events which occurred as a result of deregulation affecting every air carrier in this nation, the Civil Aeronautics Board will consider only two in determining whether the Deregulation Act caused harm to the employees in this industry. And this is what the Board said to justify its position:

> "Where a major contraction resulted from deregulation, it must also be shown that the major cause was the deregulation provided by the ADA, as opposed to the free entry and greater pricing flexibility which we were allowing prior to the passage of the ADA."

The fact that the Board's action at that time was under legal challenge which was later mooted, of course, by the enactment of ADA; and, the fact that provisions of the ADA went far beyond anything the Board attempted to accomplish or could have accomplished under the then existing law in terms of free entry or pricing flexibility, does not seem to bother the CAB in the least. It goes on to say:

> "In this regard we note that the legislative history of the ADA is predominated by discussion of two programs which could not have been implemented by us without the ADA, i.e., Automatic Market Entry and Dormant Authority. By contrast there was very little discussion of the ADA's codification of initiative as we had already taken such as fair flexibility and the placement of maximum reliance on competitive market forces. Congress thus recognized that the change in regulatory structure provided by the ADA was limited to those new programs which were previously beyond our power."

Consequently, the employees under Section 43 are effectively limited to Automatic Market Entry and Dormant Authority as the only effects of deregulation which could have hurt them.

Now as if that weren't enough the Board instead of treating this responsibility as a factfinding responsibility it determined to place upon the employees the burden of proof in the proceedings under Section 43. But it is not a simple burden of proof by the "preponderance" of the evidence or by "substantial" evidence as is normal even in administrative adversarial hearings; the employees here are burdened with proving that the CAB is wrong in the "postulates" it has set forth on pages 4 and 5 of its October order. At the top of page 6 of that order the Board says:

> "The burden of proof, however, lies in the first instance on those parties that seek to argue points of view contrary to the postulates we have stated."

Now not only are the employees required to sustain the burden of convincing the Board it has been wrong but the Board has placed upon the employees a burden so severe that in our court system it is required only in civil fraud and deportation cases. It is a burden of proof that is next in the hierarchy of severity to that required of criminal prosecutors in trying persons accused of felonies. At page 11 of the order which is attached to our testimony of last May, there is the following statement:

> "Any party attempting to prove qualifying dislocations exist must convincingly demonstrate that decreases were due to the regulatory structure brought about by the ADA and not to the aforementioned factors or to other trends that clearly had been established before deregulation." (Emphasis supplied.)

The gist of these orders and their implementation is - the Board doesn't think deregulation was "the major cause" of any employee harm but the employees are free to persuade the Board by "convincingly demonstrating" to the Board that it is wrong. The two orders of the Board and the procedures which are being carried out in execution of those orders I believe would convince any objective lawyer faced with the task of obtaining the protection to which his clients are entitled under Section 43, that there is no way the employees will ever receive any protection whatever under this statute.

All the statute has done is to pay lip service to the protection of employees which Congress acknowledged it would injure as a result of enactment of the Deregulation Act and to drain thousands upon thousands of dollars from union funds through a myriad of meaningless procedures and litigation by unions in an attempt to obtain what is essentially unobtainable under this statute.

We know the employees are going through a Kabuki dance at the CAB. We know the CAB will find that the Airline Deregulation Act was not the major cause of any ill which has occurred to the industry since 1978. Indeed, we would not be surprised if the Board found that without deregulation, the employees - even the 1978 employees - would be worse off today.

(Incidentally, employees have not suffered in Canada. The Canadian air carriers have suffered through the PATCO strike, through fuel price increases, through the recession, but not through deregulation. As a result their income and their employment held steady and even gained throughout this entire period until the recession caught up with them in 1982. Attached to my prepared testimony as Appendix II are two excerpts from Aviation Daily of December 23, 1983 which are reproduced with the permission of the editor and which show Canadian air carrier net income, total employees, passengers carried, and revenue passenger miles for 1971 through 1982.)

On January 17, 1984, the Chairman of this Subcommittee made a speech to the International Aviation Club in which he listed a number of concerns he had about the future of domestic aviation following the sunset of the CAB. We believe that these were and are valid concerns and that appropriate legislation should be enacted regarding them. The Chairman spoke of consumer protection, new entrant fitness, anti-trust immunity, insulation of the Department of Transportation from political influence, and its organization of functions, appropriate DOT staffing level, DOT responsibility for essential air service in small communities, and finally, supplemental funding to prevent an early shutdown of the CAB. However, the Chairman did not mention what has happened and is continuing to happen to employees or the failure of Section 43 in its present form to protect them. Of course, there was no mention of any possible need for legislation in this area. The Chairman did say, however, that there should be no "special interest add-ons" to any legislation affecting CAB sunset.

We do not believe that amending the law in order to carry out the will of Congress as expressed by Congress in the Senate Report on the bill which was adopted by the Conference Committee could be considered "special interest add-ons". The Report said:

> " . . . Congress, on behalf of the American people must insure that the benefits to the public which result from its decision to alter substantially the regulation of air transportation are not paid for by a minority - the airline employees and their families who have relied on the present system . . .
>
> Congress, [in the past] having acted to prevent the normal free market evolution of the industry, now has a duty to the industry and its employees which would not exist if such action had not been taken." (Emphasis supplied.) Senate Report No. 95-631, 95th Cong., 2nd Session at page 114 (1978).

We believe Congress meant what it said. It wanted to protect the employees affected by its repeal of the regulatory protection which had always existed. It acknowledged that any public benefits coming from this repeal could be paid for by the employees and their families. Mr. Chairman and members of the Committee it has been paid for by the employees and their families. And Congress said it would protect them. It has not done so and unless this law is amended, it will not do so. We respectfully submit that if Congress did not mean what it said in the quotation which I have just read, it should tell us straight out by repealing Section 43 and not by inaction - by ignoring us.

We have attached to this testimony as Appendix III, a proposed amendment which will allow some protection to the thousands of employees who have been hurt by this law. It is a simple amendment. It is consistent with what the Secretary of Labor found was necessary to protect employees who were hurt by Congress' enactment of the Rail Passenger Service Act. It is consistent with what the Interstate Commerce Commission has found is necessary to protect employees affected in merger, acquisition and abandonment cases in the railroad industry.

The people who were employed in this industry in 1978 seek and are entitled to nothing more than simple justice under this law. They have not received it and they will never receive it unless the amendment we suggest, or one substantially similar to it, is enacted into law. If Congress made a mistake in Section 43, they should correct it. If Congress did not make a mistake in Section 43 but intended rather that employees should receive no protection, they should tell us so that the representatives of these employees can stop wasting their funds in meaningless proceedings.

We also propose an amendment attached to this testimony as Appendix IV which would prevent the use of the bankruptcy laws to destroy collective bargaining agreements and would at the same time protect the public from the sudden cessation of operations which occur today when a carrier determines to go into bankruptcy with its concomitant loss of large sums of money by ticketholders and the enormous inconveniences which are caused the travelling public. We commend both of these amendments to your consideration.

Thank you.

APPENDIX I

Order 83-10-29

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

SERVED OCT 13 1983

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 6th day of October, 1983

EMPLOYEE PROTECTION : PROGRAM INVESTIGATIONS :	Dockets 38418, 40201, 38570, 38978, 38720, 39783, 38883, 38184 and 38571

ORDER

By Order 83-4-36, April 7, 1983, we set for hearing nine cases involving applications for determination of a qualifying dislocation pursuant to section 43 of the Airline Deregulation Act of 1978. Our order also includes several tentative conclusions intended to guide the parties and administrative law judges who will participate in and direct those hearings.

The International Brotherhood of Teamsters (IBT) has filed a petition for reconsideration of Order 83-4-36 in which it objects to the tentative conclusions contained in that Order. The Air Line Pilots Association, International (ALPA) also alleges a number of specific flaws in the presumptions raised by the order. In addition, it filed a motion to disqualify and for other relief alleging that two Members are biased and have prejudged the issues in these proceedings.[1] It contends these two Board members should be disqualified and that all proceedings in these dockets should be stayed pending consideration of the issues in Order 83-4-36 by an unbiased quorum of the Board.

No answers to the IBT's petition or ALPA's motion have been filed.

As discussed below, we will clarify the tentative views expressed in the instituting order. In addition, we find that there is no basis to disqualify the two Board members, as ALPA asks.

The Major Cause

The IBT argues that we misinterpreted section 43's requirement that the ADA be "the major cause" of a carrier's major contraction before we find a "qualifying dislocation". It asserts that Congress did not intend for "the major cause" to mean a cause more important than any other cause. ALPA and the IBT also contend that we erred in requiring the labor parties to establish that the ADA caused at least 40 to 50 percent of the major contraction before we will find that the ADA was the major cause of the contraction.

1/ Chairman McKinnon and Member Morales.

We have rejected the IBT argument concerning "the major cause" twice already.[2] We stated that such a definition would be a radical departure from the plain meaning of the statute. We do not believe that the legislative history of section 43 supports a different interpretation.[3]

After carefully reviewing the legislative history of the ADA, we conclude that Congress intentionally chose to limit findings of qualifying dislocations to cases in which the ADA was "the major cause" rather than merely "a major cause". We base this conclusion on a number of factors, including a broad harmonization of the basic intent of the statute. The Employee Protection Program was a controversial part of the ADA and the subject of compromises by both proponents and opponents of the provision. Under the interpretation we have adopted, all protected employees would benefit from the "first right-of-hire" provision of section 43 while federal assistance payments would be limited to those whose employment was clearly adversely affected by the ADA. This combination of broad coverage of the hiring priority and the more narrow federal payments coverage reflects a balance between comprehensive employee protection and unchecked expenditures of federal funds that we believe Congress intended to achieve. Moreover, our interpretation is fully consistent with the "caused in major part" formulation contained in the Senate bill and cited by IBT.

This conclusion is bolstered by the fact that the alternative interpretations suggested by the labor parties could produce absurd results. As we stated in Order 83-4-36, the "but for" test which IBT proposes could lead to the finding of a qualifying dislocation where the ADA was a relatively minor cause of a contraction and was less significant than many other causes.[4] Similarly, we have noted that ALPA's suggestion that "the major cause" be interpreted to allow benefits if employees' job loss was "substantially attributable to deregulation" might be of little assistance to us because "substantially attributable" is subject to widely varying interpretations.[5] We also believe this test ignores the intent of Congress by allowing a finding of a qualifying dislocation where the ADA was not "the" major cause.

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[2] PR-245, adopted November 18, 1981, Supplementary Information, and Order 83-4-36, April 7, 1983.

[3] The legislative history cited by the IBT is the use of the language "caused in major part" in Senate bill S. 2493, the "Air Transportation Regulatory Reform Act of 1978" and the use of "a major cause" in the Conference Report on the ADA. The language in Senate bill S. 2493 predates the ADA. We must, therefore, assume that Congress deliberately chose to establish a different standard in the ADA, having rejected the language in Senate bill S. 2493. While it is not clear why the Conference report uses different language than the statute, this ambiguity must be resolved in favor of the language ultimately included in the statute. The legislative history cited by the IBT thus supports our interpretation of the statute. Clearly it does not justify a conclusion that the language considered and rejected by Congress is entitled to greater weight than the language which was included in the statute.

[4] Order 83-4-36, April 7, 1983, p. 13.

[5] Id., pp. 13-14.

Finally, Congress charged us with the implementation of the policies of the statute, and necessarily gave us some discretion in its interpretation. To the extent that there may be some ambiguity in the legislative history--although none in the language of section 43 itself--we believe we have exercised our discretion reasonably. Our interpretation fits the logical purpose of section 43. Where parties have argued that the provision is ambiguous, we have considered all proposed interpretations and decided on a formulation we believe is both fair and workable. Our action rests well within the bounds of the discretion Congress has granted us to carry out our responsibilities under section 43.

The 40 to 50% Test

ALPA and the IBT claim that the requirement that at least 40% of the major contraction have been caused by the ADA is inconsistent with our interpretation of "the major cause", requires quantification which is not necessarily possible, excludes relevant evidence, is unclear and cannot be met with the data requested by Order 83-4-36. We reject each of these contentions.

Strictly speaking, the 40-50% requirement is a lower standard than "the major cause" would suggest, i.e., 51% or more. However, it recognizes the practical difficulties of proof in these cases. Moreover, it is perfectly consistent with our interpretation of "the major cause". In order to establish a qualifying dislocation, the labor parties must show that the ADA caused at least 40% of the major contraction and was more important than any other single cause of the major contraction. By requiring both of these elements to be present, we will avoid finding a qualifying dislocation where, for example, the ADA was more important than any other cause of the major contraction, but still did not account for enough of the contraction to be considered "the major cause". In addition, it avoids the unfair result of a sharp cutoff point of 51%, where the ADA, for example, contributes 45% of the dislocation and is greater than any other single cause. Some leeway on the downside from a 51% standard seems to us a reasonable exercise of discretion, and should not be objectionable to the labor parties. Thus, we have, in essence, defined "the major cause" as a substantial cause which is more important than any other cause, with the 40-50% test defining "substantial." Even under the "in major part" and "a major cause" tests which the IBT argues Congress intended, the 40-50% requirement would be reasonable to assure that the ADA was so substantial a cause that it could be deemed "major."

Nor does the 40-50% requirement create an impossible burden for those attempting to prove a qualifying dislocation or require them to rely solely on statistical evidence. We recognized in Order 83-4-36 the difficulties in quantifying the degree to which the ADA caused a particular major contraction. Nonetheless, we believe that an attempt at quantification is desirable to assure that our ultimate findings are consistent with our interpretation of "the major cause". We ask only that the parties and law judges use their best efforts to quantify the extent to which the ADA caused each major contraction. The 40-50% requirement is not a strict burden which must be met regardless of the difficulties in quantification. We believe it will help, not hinder, the parties' presentations of their cases and our ultimate determinations.

Parties attempting to establish a qualifying dislocation will not be unfairly limited in the evidence they may use. Order 83-4-36 expressly provides for the use of oral and documentary evidence.[6] The parties will have access to such evidence as the administrative law judges allow, in addition to that requested by Appendix A of Order 83-4-36, in presenting their cases. This will allow every party the opportunity to use whatever relevant information the law judges allow and put no party at an unfair disadvantage.

While the 40-50% requirement is subject to more than one interpretation, as ALPA notes, we intend it to mean that at least 40% of the cause of job losses in a major contraction was the change in regulatory structure provided by the ADA. We expect this determination to be made for the group of employees who lost their jobs rather than on an employee-by-employee basis. Thus, parties should focus on the relative importance of various causes of each airline's major contraction or bankruptcy rather than attempting to identify the causes or motivations behind particular employees' job losses.

"Presumptions"

ALPA and the IBT also argue that we have not provided adequate support for our tentative conclusion in Order 83-4-36 that employment declines of less than 10% cannot necessarily be ascribed to deregulation, but rather can be expected as normal adjustments to industry developments. We agree that there is a need for further analysis of this question. Indeed, the answer may be different for different carriers. We will leave it for the parties to argue, and the law judges to decide, whether there are levels of contraction at which we should presume that the ADA was, or was not, the major cause.

Whatever conclusions are reached, those attempting to establish a qualifying dislocation will be required to prove that the major cause of decreased employment was the ADA, rather than other factors which have caused airline employees to lose their jobs in the past. Historical employment statistics will thus be useful in judging the degree to which a contraction exceeds pre-ADA declines in employment. We expect the parties to develop a record which shows how particular carriers' employment has been affected by previous recessions, fuel price increases and other factors which may have contributed to their major contractions. This will allow the administrative law judge to compare the effects these factors have historically had on particular carriers to the effect they had on them during their major contractions. By establishing the extent to which a particular carrier's employment was affected by fuel price increases or recessions of similar magnitude in the past, the law judges should be better able to focus on how much of a major contraction is attributable to other factors, including the ADA.

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[6] Order 83-4-36, pp. 11 and 12.

The IBT also expresses concern regarding several statements made in Order 83-4-36. The Order stated that: (1) we believe employment in the airline industry is determined by the quantity of air travel (and industry productivity); (2) the rise in fuel prices, as well as the cost of other inputs, would probably have led to an increase in fares (and a decrease in traffic) whether or not deregulation took place; (3) the ability to offer discount fares may have enabled carriers to maintain load factors during the recession, with probably salutory effects on employment levels; and (4) the airline industry became more efficient, at least in part, because of rising costs.

These statements are based on elementary economic principles. Also, they should be self-evident common sense working postulates for the purpose of this case. They can set the background for issues which must be explored in these hearings. For example, we expressly asked the parties to attempt to quantify the employment effects of fuel price escalation.[7] As the IBT notes, Order 83-4-36 was written without the benefit of the data we have asked the Bureau to produce. We hope that the data we requested and the other evidence produced by the parties will allow the parties and law judges to explore more fully the relationships between airline employment, on the one hand, and costs, the economy, and other factors, on the other.

On the other hand, we will not require the parties to prove the validity of these working postulates. We believe they are valid, based on commonly-accepted, proven economic theory, our own experience in regulating the airline industry, and, indeed, the economic presumptions that underlie the ADA itself.[8] To require specific proof would make these cases unmanageable and undecidable in any reasonable period of time. As a practical matter, we cannot countenance such a result.

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[7] Order 83-4-36, p. 9.

[8] We note, for example, that the Domestic Passenger Fare Investigation, which preceded the ADA, and Standard Foreign Fare Level, which is in effect today, generally provide for an increase in fares following an increase in the cost of inputs. Similarly, there is more than ample evidence that airlines have shifted away from less efficient aircraft as the cost of operating them increased dramatically. We have observed the favorable effect of discount fares on load factors for many years, extending back at least to 1978. See Order 78-12-106, December 14, 1978, pp. 17-18, Order 79-1-64, January 11, 1979, pp. 4-5 and Order 79-10-16, August 29, 1979, p. 11.

While we believe these working postulates are reasonable and do not prejudice any party, parties will be free to offer evidence that these working postulates are incorrect. In certain cases, they might be inapplicable in whole or part because of unusual circumstances affecting an airline's operations. We are also open to argument and evidence demonstrating this. Indeed, we welcome it. The burden of proof, however, lies in the first instance on those parties that seek to argue points of view contrary to the postulates we have stated.

Management Decisions

ALPA contends that we have written off, as not related to deregulation, mergers, route expansion efforts and other management initiatives. This is not correct. In fact, Order 83-4-36 does not reach any conclusion on these questions. Rather, we have specifically focused attention on the effects of these matters, and asked the parties to develop evidence on them. Because they may have affected individual carriers in unique ways, we have deliberately made no decision on whether they are or are not caused by deregulation, either generically or in specific cases. By placing these questions at issue in the hearings, we will have the benefit of a full evidentiary record, briefs based on that record, and the recommendations of the administrative law judges before we decide whether any of the employment declines attributable to these factors were caused by the ADA in particular cases. Since this determination may be a key decisional factor in some determinations, we request the parties and judges to focus especially on the interrelationship between the ADA and management initiatives which affected particular carriers' employment levels.

Where a major contraction resulted from deregulation, it must also be shown that the major cause was the deregulation provided by the ADA, as opposed to the freer entry and greater pricing flexibility we were allowing prior to passage of the ADA. In other words, we could, and did, inject more competition into the airline industry under the Federal Aviation Act as it existed prior to the ADA. Before we can find a qualifying dislocation, we must establish that the major cause of the bankruptcy or major contraction was the change in regulatory structure provided by the ADA, rather than regulatory initiatives which were implemented by us under the Federal Aviation Act as it existed prior to the ADA.

In this regard, we note that the legislative history of the ADA is predominated by discussion of two programs which could not have been implemented by us without the ADA, i.e., Automatic Market Entry and Dormant Authority. By contrast, there was very little discussion of the ADA's codification of initiatives we had already taken, such as fare flexibility and the placement of maximum reliance on competitive market forces. Congress thus recognized that the change in regulatory structure provided by the ADA was limited to those new programs which were previously beyond our power.

Further support for this interpretation of section 43 can be found in the Congressional Budget Office's cost estimate of the Employee Protection Program, which is included in the House Report on H.R. 12611. The CBO determined that the program is unlikely to result in substantial costs, "if its application is carefully limited to actions and consequences stemming from this bill." [9] Congress thus intended for us to construe narrowly its definition of "qualifying dislocation" in section 43. To carry out this clear legislative intent, we must carefully limit our findings of qualifying dislocation to major contractions caused by the ADA and exclude employment declines resulting from regulatory initiatives which we implemented under the Federal Aviation Act as it existed prior to the ADA.

Miscellaneous

ALPA argues that we wrongly excluded changes in international operations from the effects of the ADA which are to be considered in determining whether a qualifying dislocation occurred. It notes that our orders have cited the changes made by the ADA as important to international route cases. It also asserts that the ADA's expansion of our exemption powers resulted in increased competition on international routes.

We agree that, to the extent that the ADA can be shown to have had effects on international operations and employment, those effects are relevant to our determination of whether a qualifying dislocation occurred. As noted above, the effect must be the result of provisions in the ADA, rather than policy changes which were made under the Federal Aviation Act as it existed prior to the ADA or the change in regulatory structure provided by International Air Transportation Competition Act of 1979. It must also be shown that the changes were not the result of liberalized bilateral agreements, or other aspects of international operations which are not the result of the provisions of the ADA.

The final argument made by ALPA is that Order 83-4-36 fails to ask for data necessary to determine whether qualifying dislocations occurred. ALPA apparently misunderstands the purpose of the information we have asked BDA to provide. Our request was not meant to limit the parties' ability to seek other relevant data from BDA or anyone else before the hearings. The data provided by BDA will thus not limit the parties' ability to present or elicit whatever evidence the law judges allow in attempting to prove their cases. ALPA's concern is therefore unwarranted.

Disqualification

ALPA seeks to disqualify Chairman McKinnon and Member Morales from further participation in this proceeding on the basis of alleged bias and prejudgment of the issues in this case. Its motion claims that certain statements Chairman McKinnon made shortly after Braniff Airways filed for

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[9] House of Representatives Report No. 95-1211 on H.R. 12611, Air Service Improvement Act of 1978, p. 26.

Chapter XI reorganization show his bias and that Order 83-4-36 shows he and Member Morales are biased and have prejudged the issues.

Member Morales' vote in favor of Order 83-4-36 is the only basis for ALPA's argument that she should be disqualified. Member Morales is not alleged to have made any statement which dealt either with the EPP cases or the cause of the bankruptcy of any carrier. The only alleged evidence of bias and prejudgment against Member Morales is the fact that she voted in favor of Order 83-4-36, which ALPA contends warrants her disqualification.

The Chairman and Member Morales have submitted statements that they have not prejudged these cases and do not believe themselves disqualified. The statements are attached. In addition, we have asked our Acting General Counsel to look into these assertions. He concludes that disqualification is not warranted under the facts known. Since the allegations against Member Morales are based solely on her vote for Order 83-4-36, he advises that there is no basis for her disqualification.

With respect to the allegations of prejudgment, he believes that ALPA has not demonstrated that "a disinterested observer may conclude that [the decision-maker] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it."[10] Similarly, he advises that Chairman McKinnon's statements, fairly read, do not reflect any personal bias which would require his disqualification. Finally, he concludes that Order 83-4-36 does not establish that Chairman McKinnon or Member Morales are biased or prejudged the issues and that there is no evidence to support ALPA's claim that Chairman McKinnon improperly influenced the Board or its staff.

We have reviewed the Acting General Counsel's memorandum, which we have attached to this order. We find his conclusions well reasoned and supported and adopt them as our own. We would note that in addition to the statements cited by the Acting General Counsel as evidence that Chairman McKinnon had not prejudged the issues in the Braniff EPP case, one of the articles cited by ALPA provides further support for this conclusion. In the May 14, 1982, *New York Times* article quoted by ALPA, after saying poor management decisions and the recession, rather than deregulation, were to blame for Braniff's bankruptcy, Chairman McKinnon is reported to have said that "Nonetheless . . . the Board is studying whether to provide compensation to more than 8,000 Braniff employees [pursuant to section 43]." It is thus clear that Chairman McKinnon had not prejudged the issues in Braniff's EPP case at the time of his statement.

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[10] *Cinderella Career and Finishing Schools, Inc.* v. *F.T.C.*, 425 F.2d 583, 591 (D.C. Cir. 1970), *Quoting Gilligan, Will and Co.* v. *S.E.C.*, 267 F.2d 461, 469 (2d Cir. 1959), *cert. denied*, 361 U.S. 896 (1959).

ACCORDINGLY:

1. We deny ALPA's motion to disqualify Chairman McKinnon and Member Morales; and

2. Except to the extent granted, we deny the IBT's petition for reconsideration and the remainder of ALPA's motion.

By the Civil Aeronautics Board:

PHYLLIS T. KAYLOR
Secretary

(SEAL)

All Members concurred except Members Schaffer and Smith who concurred and dissented and attached the following joint concurring and dissenting statement.

SMITH, MEMBER, AND SCHAFFER, MEMBER, CONCURRING & DISSENTING:

We are encouraged that this order has clarified, to some extent, the Board's willingness to remain open-minded on the use of the tentative presumption about employment declines of less than 10% and the 40% threshold for determining whether the ADA was the major cause of a major contraction. We still believe, however, that such arbitrary percentages are premature and unnecessary at this stage of the proceedings and suggest the imposition of an undue burden on the parties.

We question some new language in this order purporting to make a distinction between the actions specifically mandated by the ADA and steps the Board took in anticipation of that legislation. Trying to separate the Board's actions and the statutory provisions that followed them would be very difficult and is not required by the ADA.

/S/ JAMES R. SMITH

/S/ GLORIA SCHAFFER

CIVIL AERONAUTICS BOARD

October 4, 1983

MEMORANDUM

TO: Dockets Section, B-12
Office of the Secretary

FROM: The Chairman

SUBJECT: EPP Applications for Determination of Qualifying Dislocation

Docket 38885 (AeroAmerica)
Docket 38418 (Airlift International)
Docket 40201 (Air New England)
Docket 38570 (American Airlines)
Docket 38978 (Braniff International Airways)
Docket 38720 (Continental Airlines)
Docket 39700 (Delta Air Lines)
Docket 38536 (Eastern Airlines)
Docket 39783 (Mackey International Airlines)
Docket 34562 (Overseas National Airways)
Docket 38883 (Pan American World Airways)
Docket 38184 (Trans World Airlines)
Docket 38571 (United Airlines)

Please include the attached statement in the Correspondence Section of each of the above-referenced dockets.

Dan McKinnon

Response of Chairman Dan McKinnon to Motion for Disqualification and other Relief filed by the Airline Pilots Association

1. I, Dan McKinnon, am a Member of the Civil Aeronautics Board, where I serve as its Chairman. I make this statement on the basis of knowledge obtained in the performance of my official duties.

2. I was one of the five duly constituted Members of the Civil Aeronautics Board who adopted Order 83-4-36 on April 7, 1983, which is the subject of the present Motion for Disqualification and Other Relief which seeks to disqualify myself and Member Diane K. Morales from further participation in Order 83-4-36 due to alleged bias and prejudgement, filed by the Air Line Pilots Association on June 6, 1983.

3. The other four duly constituted Members of the Civil Aeronautics Board who adopted Order 83-4-36 on April 7, 1983 were Vice Chairman Elizabeth E. Bailey, Member Gloria Schaffer, Member James R. Smith and Member Diane K. Morales.

4. By Order 83-4-36, adopted on April 7, 1983, the Civil Aeronautics Board set for hearing nine cases involving applications by various groups of present and former airline employees for determination of a "qualifying dislocation" pursuant to Section 43 of the Airline Deregulation Act of 1978. Order 83-4-36 also includes several tentative conclusions intended to guide the parties and administrative law judges who will participate in and direct those hearings.

5. All Members voted to adopt Order 83-4-36 except Members Gloria Schaffer and James R. Smith, who filed a separate joint statement attached to Order 83-4-36 in which they concurred in part and dissented in part.

6. My vote to adopt Order 83-4-36 was based solely on my personal evaluation of the evidence of record, the recommendations of my personal staff, and those of the professional staff of the Civil Aeronautics Board. This is the usual method of handling such matters within the Civil Aeronautics Board.

7. At no time have I ever attempted to influence any of the other four Members of the Civil Aeronautics Board in their deliberations on the merits of Order 83-4-36 by any improper means or in any improper manner whatsoever--nor have I ever attempted to improperly influence the professional staff of this agency in its preparation of Order 83-4-36 before review by the Civil Aeronautics Board.

8. I have no personal interest in the outcome of the deliberations of the Civil Aeronautics Board on the merits of Order 83-4-36.

9. At no time have I harbored or expressed a personal bias or prejudice against any party to, or person or organization which has an interest in, the outcome of the deliberations of the Civil Aeronautics Board on the merits of Order 83-4-36.

10. At no time have I prejudged the issues of fact or law which are relevant to the deliberations of the Civil Aeronautics Board on the merits of Order 83-4-36. I have repeatedly stated on prior occasions, and I reaffirm at this time, that my mind is open on all issues of fact or law which are relevant to the outcome of the deliberations of the Civil Aeronautics Board on the merits of the applications for determination of a "qualifying dislocation" pursuant to Section 43 of the Airline Deregulation Act of 1978.

11. To the best of my knowledge, information and belief, the allegations of the Air Line Pilots Association in support of its June 6, 1983 Motion for Disqualification and Other Relief are without merit.

Dan McKinnon

CIVIL AERONAUTICS BOARD

October 5, 1983

MEMORANDUM

TO: Dockets Section, B-12
Office of the Secretary

FROM: Member Diane K. Morales

SUBJECT: EPP Applications for Determination of Qualifying Dislocation

Docket 38885 (AeroAmerica)
Docket 38418 (Airlift International)
Docket 40201 (Air New England)
Docket 38570 (American Airlines)
Docket 38978 (Braniff International Airways)
Docket 38720 (Continental Airlines)
Docket 39700 (Delta Air Lines)
Docket 38536 (Eastern Airlines)
Docket 39783 (Mackey International Airlines)
Docket 34562 (Overseas National Airways)
Docket 38883 (Pan American World Airways)
Docket 38184 (Trans World Airlines)
Docket 38571 (United Airlines)

Please include the attached statement in the Correspondence Section of each of the above-referenced dockets.

Diane K. Morales
Diane K. Morales

Response of Member Diane K. Morales
to Motion for Disqualification and other Relief
filed by the Airline Pilots Association

I, Diane K. Morales, am a Member of the Civil Aeronautics Board. I make this statement on the basis of knowledge obtained in the performance of my official duties.

2. I was one of the five duly constituted Members of the Civil Aeronautics Board who adopted Order 83-4-36 on April 7, 1983, which is the subject of the present Motion for Disqualification and Other Relief which seeks to disqualify myself and Chairman Dan McKinnon from further participation in Order 83-4-36 due to alleged bias and prejudgement, filed by the Air Line Pilots Association on June 6, 1983.

3. The other four duly constituted Members of the Civil Aeronautics Bord who adopted Order 83-4-36 on April 7, 1983 were Chairman Dan McKinnon, Vice Chairman Elizabeth E. Bailey, Member Gloria Schaffer, and Member James R. Smith.

4. By Order 83-4-36, adopted on April 7, 1983, the Civil Aeronautics Board set for hearing nine cases involving applications by various groups of present and former airline employees for determination of a "qualifying dislocation" pursuant to Section 43 of the Airline Deregulation Act of 1978. Order 83-4-36 also includes several tentative conclusions intended to guide the parties and administrative law judges who will participate in and direct those hearings.

5. All Members concurred in adopting Order 83-4-36 except Members Gloria Schaffer and James R. Smith, who filed a separate joint statement attached to Order 83-4-36 in which they concurred in part and dissented in part.

6. My vote to adopt Order 83-4-36 was based solely on my personal evaluation of the evidence of record, the recommendations of my personal staff, and those of the professional staff of the Civil Aeronautics Board. This is the usual method of handling such matters within the Civil Aeronautics Board.

7. I have no personal interest in the outcome of the deliberations of the Civil Aeronautics Board on the merits of Order 83-4-36.

8. At no time have I harbored or expressed a personal bias or prejudice against any party to, or person or organization which has an interest in, the outcome of the deliberations of the Civil Aeronautics Board on the merits of Order 83-4-36.

9. At no time have I prejudged the issues of fact or law which are relevant to the deliberations of the Civil Aeronautics Board on the merits of Order 83-4-36. My mind is open on all issues of fact or law which are relevant to the outcome of the deliberations of the Civil Aeronautics Board on the merits of the applications for determination of a "qualifying dislocation" pursuant to Section 43 of the Airline Deregulation Act of 1978.

10. To the best of my knowledge, the allegations of the Air Line Pilots Association in support of its June 6, 1983 *Motion for Disqualification and Other Relief* are totally without merit.

Diane K. Morales

Diane K. Morales

October 5, 1983

MEMORANDUM

TO: The Board

FROM: Acting General Counsel

SUBJECT: Motion by Air Line Pilots Association for the Disqualification of Chairman McKinnon and Member Morales from the Employee Protection Program Cases (Dockets 38184, 38418, 38571, 38720, 38883, 38978 and 40201)

A motion to disqualify Chairman McKinnon and Member Morales from participating in the pending Employee Protection Program (EPP) Cases has been filed with the Board by the Air Line Pilots Association (ALPA).

With respect to Chairman McKinnon, ALPA's motion is based on several statements that Chairman McKinnon made shortly after Braniff Airways filed for Chapter XI reorganization on May 12, 1982; on his alleged bias and prejudgment of the issues in Order 83-4-36; on his alleged improper influence over the Board and its staff and on the substantive content of Order 83-4-36; and his vote in favor of said order.

With respect to Member Morales, ALPA alleges only that the substantive content of Order 83-4-36 and Member Morales' vote in favor of said Order are evidence of her alleged bias and prejudgment and warrants her disqualification.

For the reasons set out below, I do not believe that the disqualification of either Chairman McKinnon or Member Morales is required in these cases. 1/

1/ While the Board's Regulations do not specify who decides such a Motion (i.e., the Member or the Board), in recent years, the Member has decided the issue. See Commuter Airlines, Inc., Docket 32910 (decided by Chairman Kahn); Investigation Into The Competitive Marketing of Air Transportation (decided by Member Bailey); and Lone Star Airways, Inc., Dockets 38185 and 40663 (decided by Member Smith).

I
CHAIRMAN MCKINNON'S MAY 1982 STATEMENTS

ALPA's major contention is that Chairman McKinnon made several statements during the period immediately following Braniff's filing for Chapter XI reorganization which demonstrated a bias and prejudgment, and influenced other Board Members' decisions in Order 83-4-36. There is no merit to this argument.

ALPA's motion is based on two Washington Post articles and one New York Times article. 2/ The three articles report Chairman McKinnon as having said that: (1) deregulation was not the cause of the Braniff bankruptcy; 3/ (2) after deregulation of the airline industry in 1978, Braniff made poor management decisions which resulted in overexpansion; 4/ (3) the national economic recession contributed to Braniff's inability to generate enough passenger traffic to cover the higher costs of its expanded operation; 5/ (4) he did not favor special federal aid to either Braniff or to the airline industry as a whole; 6/ and (5) the airline industry was not unique in experiencing difficulty

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2/ "Company Officials Seeking to Reorganize," The Washington Post, May 14, 1982, p. A-1; "Braniff Files Bankruptcy Petition; Other Airlines Seeking Its Routes", The New York Times, May 14, 1982, Section 1, p.1; "Airline Industry Expects to Weather the Storm," The Washington Post, May 16, 1982, p. F-12. A transcript of Chairman McKinnon's May 13, 1982, press conference is not available. For the purpose of this memorandum, however, we have assumed the accuracy of the statements ALPA attributes to Chairman McKinnon.

3/ The Washington Post, May 14, 1982; The New York Times, May 14, 1982.

4/ Id.

5/ The New York Times, May 14, 1982; The Washington Post, May 16, 1982.

6/ The New York Times, May 14, 1982.

during the recession. 7/

During the period immediately following Braniff's demise, Chairman McKinnon also made several other public statements about Braniff's bankruptcy. ALPA does not, however, make reference to them in its motion.

On May 13, 1982, Chairman McKinnon appeared on the PBS television program The MacNeil-Lehrer Report. At that time Chairman McKinnon stated in relevant part:

> "LEHRER: Mr. McKinnon, do you know of any airlines that are hanging by their fingers out there, that may go down this same road?
>
> McKINNON: I don't know if they'll go down the same road, Jim, but I think there are some airlines that do have troubles. But they're different kinds of troubles than what Braniff had. Each case is an individual case. And as Marvin...[Cohen, former CAB chairman]... pointed out, when they had the right to go to deregulation, then they had the right to make mistakes, as well as to make profit. There is one thing that came to mind here, just a moment ago in this conversation and that's under deregulation, the fact Braniff went bankrupt.
>
> Under regulation there were a lot of airlines that had a lot of troubles. The most recent ones were about '73 and '74. There was a case with Pan Am and TWA and they switched a lot of routes around which provided protection, which kept those airlines alive because they were in deep trouble at that time and they were able to maneuver that."

On May 14, 1982, an article appeared in the Journal of Commerce stating that:

> "The Board presently is studying requests from employees of 12 airlines whose employees have been laid off, and are claiming that federal deregulation of the airline industry is one of the reasons for their unemployment. Braniff will be the 13th carrier whose employees are eligible for such consideration, the CAB chairman said.

7/ The New York Times, May 14, 1982; The Washington Post, May 16, 1982.

> *He declined to speculate on the outcome of the Board's deliberations in the 13 cases."* (emphasis added) [8]

On May 18, 1982, Chairman McKinnon testified before the House Public Works Investigation Oversight Subcommittee on International Aviation Policy. At that time Congressman Levitas asked him whether deregulation caused Braniff's bankruptcy. Chairman McKinnon responded:

> Well, sir, I want to sort of evaluate the facts as I see them. I haven't seen any evidence that indicates that. *I have been very careful about flat-out statements.* I have repeated what Howard Putnam says, the Chairman of the Board of Braniff, that said it was not responsible. *I haven't seen that it has brought about it, but, you know, somebody may come up with some facts to indicate otherwise down the road."* (emphasis added) [9]

A. PREJUDGMENT

The standard for disqualification from an adjudicatory proceeding was set out in the leading case of *Cinderella Career & Finishing Schools, Inc.*,[10] In *Cinderella*, the Court held that the standard for disqualifying an administrator in an adjudicatory proeeding because of prejudgment is whether "a disinterested observer may conclude that [the decision-maker] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it."[11]

In *Cinderella*, the FTC staff charged that Cinderella Career College & Finishing Schools, Inc., made false representations in its advertising and engaged in deceptive practices in violation of Section 5 of the Federal Trade Commission Act. Cinderella allegedly advertised "courses of instruction which qualify students to become airline stewardesses" and that its graduates were "qualified to assume executive positions." [12] After the administrative law judge dismissed the complaint, the FTC staff appealed to the full Commission.

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[8] "CAB to Name Replacements for Three Braniff Routes Today," *Journal of Commerce*, May 14, 1982

[9] Hearings Before the House Public Works Investigation and Oversight Subcommittee on International Aviation Policy, May 18, 1982, Hearing Transcript p. 118.

[10] 425 F. 2d, 583, (D.C. Cir. 1970).

[11] Id, p. 591.

[12] 425 F. 2d at 584 n. 1.

While the appeal was pending, FTC Chairman Paul Dixon spoke at the Government Relations Workshop of the National Newspaper Association and stated:

> "What kind of vigor can a reputable newspaper exhibit?...What standards are maintained on advertising acceptance?...What about carrying ads that offer college educations in five weeks,...or becoming an airline hostess by attending a charm school?...Granted that newspapers are not in the advertising policing business, their advertising managers are savvy enough to smell deception when the odor is strong enough." [13]

Six months later, the Commission, with Chairman Dixon participating, found that Cinderella neither awarded nor was capable of awarding academic degrees, and that it offered no course of instruction that would qualify students as airline stewardesses. A cease and desist order was issued against Cinderella. On review, the U.S. Court of Appeals for the District of Columbia Circuit reversed the case and disqualified Chairman Dixon.

Some years later, in Association of National Advertisers v. FTC, [14] the D.C. Circuit, in the process of establishing a standard for disqualification in a rulemaking proceeding, specified the kinds of facts in issue in an adjudicatory proceeding:

> "...the factual predicate of adjudication depends on ascertainment of acts concerning the immediate parties--who did what, where, when, how, and with what motive or intent. 2 K. Davis Administative Law Treatise, Section 15.03, at 353 (1958)..." [15]

Disqualification is not required, however, where an underlying philosophy or strong convictions on questions of law and policy are expressed in advance of a particular case. For example, the Supreme Court concluded that commissioners' previously expressed views as to the general illegality of a pricing system did not disqualify them from sitting in judgment on the particular practices of specific companies even though the practices at issue were similar to those previously condemned by the commissoners in their prior statements. 16/ Also, "no basis for disqualification arises from the fact or assumption that a member of an administrative agency enters a proceeding with advance views on important economic matters in issue." 17/

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[13] Id, p. 589.
[14] 627 F. 2d 1151 (D.C. Cir.), cert. den., 447 U.S. 921 (1980).
[15] Id. p. 1159.

Although Chairman McKinnon did state in general terms that deregulation did not cause Braniff's bankruptcy, he also made clear that he had not prejudged the outcome of any of the EPP cases. Indeed, the Journal of Commerce reported that at the May 13, 1982, press conference, the Chairman "declined to speculate on the outcome of the Board's deliberations in the 13 [EPP] cases." Furthermore, five days later, the Chairman specifically stated that he had an open mind on the question of whether deregulation caused Braniff's bankruptcy when he told Congressman Levitas:

> "Well, sir, I want to sort of evaluate the facts as I see them. I haven't seen any evidence that indicates that. *I have been very careful about flat-out statements.* I have repeated what Howard Putnam says, the Chairman of the Board of Braniff, that said it was not responsible. *I haven't seen that it has brought about it*, but, *you know, somebody may come up with some facts to indicate otherwise down the road.*" (emphasis added)

These statements, contemporaneous with those cited by ALPA in support of its motion, clearly demonstrate that Chairman McKinnon had not in some measure adjudged the facts as well as the law of the EPP cases in advance of hearing them.

In addition, assuming arguendo that the Chairman's statements concerning the Braniff bankruptcy warranted his disqualification from the Braniff EPP case (which, for the reasons set out in this memorandum, they do not) this would not warrant his disqualification from the other 12 pending EPP cases.

B. BIAS

16/ *FTC v. Cement Institute*, 333 U.S. 683, 700-03 (1948).

17/ *Skelly Oil Co. v. FPC*, 375 F. 2d 6, 13 (C.A.D.C. 1967), modified on other grounds *sub nom. Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).

With respect to ALPA's claim that Chairman McKinnon's statements demonstrate a bias against its position, the law is well-settled that an adjudicatory hearing before an administrative tribunal must afford a fair trial in a fair tribunal as a basic requirement of due process.[18] However, a substantial showing of "personal" bias is required to disqualify a hearing officer or to obtain a ruling that the hearing is unfair.[19] A review of Chairman McKinnon's statements clearly demonstrates that ALPA has not made a substantial showing of personal bias on his part.

In order to constitute grounds for recusal or disqualification, the bias must be "personal," as opposed to "judicial." The federal courts have repeatedly held that personal bias must stem from an extra-judicial source.[20] This means that recusal or disqualification is not mandated where a judge or hearing officer forms opinions (even those which address the innocence or guilt of an accused) based on evidence received during the course of a trial or a prior trial involving the same or related parties and issues.[21] Applying this standard to the EPP cases, the issue is whether Chairman McKinnon has a personal bias against ALPA and its members and the issues involved in the EPP cases.

Under the Federal Aviation Act, the Board has an obligation to ensure continuous and uninterrupted international air transportation and to preserve international route structures. Shortly before Braniff's demise, the Chairman, the Board and the Board's staff had numerous contacts with Braniff (including a visit by CAB auditors) to monitor Braniff's financial position and to determine its future operations plans and the cause of its rapidly declining revenues and load factors. In addition, the Board had just granted interim approval of the Braniff-Eastern lease agreement in which Braniff leased to Eastern its Central and South America operating rights. During the course of this proceeding, the Board and its staff thoroughly analyzed Braniff's financial situation, based on information provided by Braniff.

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[18] *Withrow* v. *Larkin*, 421 U.S. 35, 46-47 (1975); *Gibson* v. [illegible]*rryhill*, 411 U.S. 564, 579 (1973); and *Amos Treat & Co.* v. *SEC* 306 F. [illegible] 260 (D.C. Cir. 1970).

[19] *Converse* v. *Udall*, 262 F. Supp. 583, 590 (D. Ore.) *aff'd*. 399 F. 2d 616 (9th Cir.), *cert. den.*, 393 U.S. 1025 (1969).

[20] *Ex Parte American Steel Barrell Co.*, 230 U.S. 35 (1913); *Craven* v. *U.S.*, 22 F. 2d 605, 607 (1st Cir.), *cert. den.*, 276 U.S. 627 (1927); *Gallarelli* v. *U.S.* 260 F. 2d 259, 261 (1st Cir.), *cert. den.*, 359 U.S. 398 (1958); *Johnson* v. *Trueblood*, 629 F. 2d 287, 291 (3rd Cir. 1980); *Hedison Mfg. Co.* v. *NLRB*, 643 F. 2d 32, 35 (1st Cir. 1981).

[21] *Craven* v. *U.S.*, 22 F. 2d 605, 607-08 (1st Cir.), *cert. den.*, 276 U.S. 627 (1927).

The statements that Chairman McKinnon made concerning the reasons for Braniff's bankruptcy were, consequently, based on information properly obtained from Braniff prior to May 13, 1982, during the course of other Board proceedings. ALPA does not allege, and there is not one scintila of evidence that so indicates, that Chairman McKinnon's statements were based on some "personal" bias against ALPA, its members or the issues in the EPP cases.

II

CHAIRMAN MCKINNON'S AND MEMBER MORALES' ALLEGED BIAS AND PREJUDGMENT OF THE ISSUES IN ORDER 83-4-36

ALPA further alleges that the substantive content of Order 83-4-36 provides further evidence of the alleged bias of Chairman McKinnon and Member Morales.

Member Morales is not alleged to have made any statement which dealt either with the EPP cases or the cause of the bankruptcy of any carrier. The only alleged evidence of bias and prejudgment against Member Morales is the fact that she voted in favor of Order 83-4-36, which ALPA contends warrants her disqualification.

Assuming *arguendo* that Order 83-4-36 is legally defective in part, the Supreme Court made clear in *Ex Parte American Steel Co.*, [22] that disqualification of the decision-makers is not mandated in such a situation:

> "The basis of the disqualification is that 'personal bias or prejudice' exists, by reason of which the judge is unable to impartially exercise his functions in the particular case. *It is a provision obviously not applicable save in those rare instances in which the affiant is able to state facts which tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias and prejudice. It was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise ...*" [emphasis added] [23]

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[22] 230 U.S. 35, 43-44 (1913).

[23] Id. See also *Craven v. U.S.*, 22 F. 2d 605, 607 (1st Cir.), *cert den.*, 276 U.S. 627 (1927); *Gallarelli v. U.S.*, 260 F. 2d 259, 261 (1st Cir.), *cert. den.*, 359 U.S. 398 (1958); *Johnson v. Trueblood*, 629 F. 2d 287, 291 (3rd Cir. 1980); *Hedison Mfg. Co. v. NLRB*, 643 F. 2d 32, 35 (1st Cir. 1981).

If ALPA believes that the order is legally deficient, it can pursue its case and seek judicial review of the decision in the appropriate forum.

III

CHAIRMAN MCKINNON'S ALLEGED "INFLUENCE" OVER THE BOARD AND ITS STAFF

ALPA alleges that, as a result of his bias and prejudgment of the issues in the EPP cases, Chairman McKinnon, by virtue of his position, has "influenced" the Board and the staff into taking the position set forth in Order 83-4-36.

ALPA has provided no evidence whatsoever in support of its allegation of improper influence against Chairman McKinnon. If ALPA were correct, the Board and the staff would merely be a rubber stamp for the Chairman's views. On several occasions since he took office, the Chairman has dissented from various Board positions. Chairman McKinnon is only one of five voting Board Members, each having an equal voice in determining positions recommended by the staff. Absent proof, such unsupported allegations of undue influence against Chairman McKinnon can only be regarded as frivolous.

Ivars V Mellups

Ivars V. Mellups

CANADIAN CARRIERS PASSENGERS CARRIED 1971-1982

Year	Unit Toll	Charter	Total
1982*	20,903,940	3,985,009	24,888,949
1981**	23,461,213	3,693,243	27,154,456
1980	24,046,943	4,507,448	28,554,391
1979	22,812,269	4,276,619	27,088,888
1978	19,832,600	3,816,504	23,649,104
1977	18,859,361	3,458,818	22,318,179
1976	17,991,478	3,002,238	20,993,716
1975	17,750,802	2,741,819	20,492,621
1974	17,255,527	2,345,474	19,601,001
1973	15,343,817	2,149,355	17,493,172
1972	12,572,145	1,849,386	14,421,532
1971	11,128,124	1,761,271	12,889,395

*Preliminary. **Revised.

CANADIAN CARRIERS REVENUE PASSENGER MILES (000)

Year	Unit Toll	Charter	Total	Average Passenger Journey (miles)
1982*	21,595,836	6,774,484	28,370,320	1,140
1981**	23,627,829	6,059,467	29,687,296	1,093
1980	22,655,248	6,547,595	29,202,843	1,023
1979	21,491,750	6,405,913	27,897,663	1,030
1978	18,375,478	5,377,438	23,752,906	1,004
1977	17,122,843	4,955,716	22,078,559	989
1976	16,268,718	4,098,114	20,366,832	970
1975	15,656,938	3,928,819	19,585,757	956
1974	15,395,092	2,716,723	18,111,815	924
1973	13,598,839	2,482,981	16,081,820	919
1972	11,489,253	2,010,414	13,499,667	936
1971	9,564,265	1,941,114	11,505,379	893

*Preliminary. **Revised.

(See Related Chart on Back of Following Page)

CANADIAN CARRIERS FINANCIAL TOTALS 1973-1982

Year	Operating Revenues	Operating Expenses	Operating Income	Net Income*
	$	$	$	$
1982**	4,741,182,264	4,768,806,716	−27,624,452	-100,000,000
1981***	4,648,845,729	4,494,367,404	154,478,325	44,806,039
1980..........	3,984,707,938	3,797,561,372	187,146,206	112,443,368
1979..........	3,255,548,550	3,090,981,802	164,566,748	95,348,585
1978..........	2,679,517,221	2,514,112,746	165,404,475	98,182,776
1977..........	2,358,293,688	2,214,450,323	143,843,365	39,401,389
1976..........	2,057,646,564	2,002,318,689	55,327,875	-15,787,939
1975..........	1,891,307,412	1,822,871,888	68,435,524	-6,795,459
1974..........	1,597,805,374	1,525,215,933	72,589,441	5,574,510
1973..........	1,253,743,728	1,172,860,718	80,883,010	23,906,682

*After income taxes and interest charges. **Preliminary. ***Revised.

CANADIAN CARRIERS EMPLOYMENT AND PAYROLL 1973-1982

Year	Employees	Total Wages	Average Wage*
1982*......................	47,227	1,349,889,341	28,583
1981**....................	47,451	1,275,418,521	26,879
1980......................	47,676	1,124,728,167	23,591
1979......................	45,358	948,833,436	21,884
1978......................	40,167	792,147,604	19,803
1977......................	39,466	739,830,965	18,970
1976......................	39,950	669,970,737	17,178
1975......................	40,321	603,690,579	15,092
1974......................	38,874	511,660,075	13,464
1973......................	34,061	413,341,176	12,157

*Preliminary. **Revised.

(See Related Chart on Back of Following Page)

Source: Aviation Daily
December 23, 1983

APPENDIX III

PROPOSED AMENDMENT TO SECTION 43 OF THE AIRLINE DEREGULATION ACT OF 1978

Section 1. Amend Section 43(a) by adding the following new subsection: "(3) In determining whether a major contraction or bankruptcy is a qualifying dislocation, the Civil Aeronautics Board shall require the party requesting such a determination to identify the pertinent facts upon which that party relies to show that the major contraction or bankruptcy was caused in part by the change in regulatory structure provided by the Airline Deregulation Act of 1978. It shall then be the burden of any party opposing such a determination to prove that factors other than such a change in regulatory structure caused the major contraction or bankruptcy. The Board shall find a qualifying dislocation if it is established that the change in regulatory structure was a reason for the major contraction or bankruptcy, even if other factors also may have caused the major contraction or bankruptcy."

Section 2. Amend Section 43(d) by adding at the end thereof the following new subsection: "(4) The district courts shall have original jurisdiction of all civil suits, regardless of amount in controversy, to enforce the rights of protected employees under this section to first right of hire."

Section 3. Amend Section 43(h)(2) by deleting "the major cause" and substituting the following: "a major cause".

APPENDIX IV

NEED FOR PROPOSED AMENDMENTS

The past five years have been very difficult ones financially for our nation's airlines with virtually every major airline operating at a loss during that period. While that situation has improved slightly, albeit perhaps only temporarily, the tremendous financial losses of the past few years have caused two major airlines--Braniff and Continental--to file for reorganization under Chapter 11 of the Bankruptcy Code, and have left at least five other airlines on the brink of bankruptcy. Indeed, it is very likely that at least three of those financially distressed airlines may seek the protections of the Bankruptcy Code within the next few months. Braniff's, and now Continental's, experiences under Chapter 11 have shown that airline reorganizations, because of the unique role that air transportation plays in our national economy, present special concerns that are not addressed by the ordinary reorganization provisions in the Bankruptcy Code. Those public interest concerns, however, are comparable to those raised in railroad reorganizations and are addressed in the railroad reorganization provisions of Chapter 11 (*i.e.*, Subchapter IV --Sections 1161 to 1174).

Airlines obtain their revenues by providing a service to the public that has become a crucial element of our national transportation system. Unfortunately, the ordinary business reorganization provisions of Chapter 11 do not require that this public interest element of air transportation be protected, or for that matter, even be considered during the course of a debtor's reorganization. Also, the airline employee is an integral part of an airline's operations, and indeed Congress has long recognized the important and unique role that airline employees, like railroad employees, play in our transportation system. If enacted, these proposed amendments would mandate the appointment of a Trustee to bring a new and objective view to the airlines' problems and prospects, and would require the Trustee and the Bankruptcy Courts to consider the public's and the airline employee's interests in making decisions which impact so heavily upon the public and the employee. Moreover, these amendments should prevent the undue hardships to airline passengers which occurred when Braniff and Continental ceased operations without warning; they should prevent airline passengers and travel agents from booking away from financially troubled airlines because of a fear of such unannounced shutdowns; and they should eliminate the incentive of airline management to use reorganization provisions of the Bankruptcy Code to reduce labor costs.

To accomplish those goals these amendments modify Subchapter IV by placing airlines under those provisions. No other substantive change is made in Subchapter IV except to add provisions (*i.e.*, proposed Sections 1163(b) and (c)) to prevent the stranding of passengers and employees by the precipitous cessation of all or substantially all scheduled operations, and to require proposed Sections 1172(e)(1) and 1173(b) that the interests of airline employees not be ignored. Neither substantive modification is unique. First, railroads, prior to filing to reorganize, are required by 49 U.S.C. §10903 to obtain prior regulatory approval before ceasing operations, and after filing a petition to reorganize, are required to obtain prior court approval before ceasing all or any portion of their operations. Proposed Sections 1163(b) and (c) apply those principles to airlines which seek the Code's benefits. Second, proposed Sections 1172(e) and 1173(b)'s requirements that the interests of airline employees be considered, simply implement the long recognized principle that just and reasonable treatment of airline employees is essential to an efficient and safe air transportation system. Also, proposed Section 1172(e)'s requirement that airline employees be given certain procedural protections makes mandatory what the Civil Aeronautics Board has the discretion to impose under 49 U.S.C. §1378, and provides less protection than that required for railroad employees under Section 1172(c).

SIDE-BY-SIDE COMPARISON OF CODE PROVISIONS

SUBCHAPTER IV

SECTION	RAILROAD PROVISIONS AT PRESENT		AIRLINE PROVISIONS AS PROPOSED
1161	Sections inapplicable to Subchapter IV:		
	1. §341	Meeting of creditors	Amend to provide same sections do not apply to airlines
	2. §343	Examination of Debtor	
	3. §1102(a)(1)	Appointment of Creditor Committee	
	4. §1104	Appointment of Trustee, Examiner	
	5. §1105	Termination of Trustee's Appt.	
	6. §1107	Debtors-in-possession's duties	
	7. 1129(a)(7)	Plan - each holder of claim --liq. value	
	8. §1129(c)	only one plan can be confirmed	
1162	"Commission" refers to ICC		Amend to add definition of CAB
1163	Appointment of Trustee DOT Sect. to submit list of 5		Amend to include provisions to prevent precipitous shutdown unless Trustee and Court authorize.
1164	Right to be heard Commission, DOT and any state or local comm. having regulatory jurisdiction on debtor		Amend to add CAB
1165	Protection of public interest - in applying 1166, 1167, 1169, 1170, 1171, 1172, 1173 and 1174		No amendment necessary to make section applicable to airlines in reorganization
1166	Effect of ICC and Federal, state or Local Regulations subject to federal and state regulation, but court has power to approve money order		Amend to include applicability of 49 U.S.C. §1301, *et seq*. to airlines

		in reorganization
1167	Collective Bargaining Agreement cannot be changed except in accordance with §6 of RLA	No amendment necessary to make section applicable to airlines in reorganization
1168	Rolling Stock Eq.	Amend to reflect applies only to railroads; airlines covered by 11 U.S.C. §1110
1169	Effect of rejection of lease of railroad line	No change; applies only to railroads
1170	Abandonment of railroad line	No change; applies only to railroads
1171	Priority of claims	
	(a) Adm. expense - personal injury	Amend to be applicable only to railroads
	(b) Any unsecured claim - 6 mos. rule	No amendment necessary to make section applicable to airlines in reorganization
1172	Contents of plan	
	(a) plan to specify extent of continuation of operations	Amend to make applicable to airlines
	(b) ICC approval on transfers or sales	add new subsection to provide comparable provisions for airlines with limited protection for employees
	(c) Employee protection	
1173	Confirmation of Plan (modifications to §1129(a)(7) and (c))	Amend to make applicable to airlines, including protection of public, employee and creditor interests

1174	Liquidation	No amendment necessary to make section applicable to airlines in reorganization
Other Provisions To Be Modified:		
§103(g)	Subchapter IV applies only to railroads	Amend to make subchapter IV applicable to airlines
§109(b)(1)	Railroad cannot be Chapter 7 debtor	Amend to include airlines, with exception for both railroads and airlines which are under Section 1174 ordered to be liquidated

PROPOSED AMENDMENTS TO BANKRUPTCY CODE, 11 U.S.C. §101, *et seq*

1. Section 103(g). Amend Section 103(g) by adding immediately before the period at the end thereof the following: "or an airline engaged in interstate or foreign commerce of passengers or property.

2. Section 109. Section 109(b)(1) shall be amended by adding in lieu thereof the following: "(1) a railroad or an airline subject to Subchapter IV of Chapter 11, except as provided in section 1174 of this title;".

3. Subchapter IV--Railroad Reorganization

   a. Amend title to read: "Subchapter IV--Railroad And Airline Reorganizations";

   b. Section 1161. Amend Section 1161 by adding immediately before the period at the end thereof the following: "or an airline engaged in interstate or foreign commerce of passengers or property.";

   c. Section 1162. Amend Section 1162 by adding immediately before the period at the end thereof the following: ", and Board means Civil Aeronautics Board or the federal agency or Executive Department to which the Board functions are transferred after December 31, 1984";

   d. Section 1163. Amend Section 1163 by redesignating Section 1163 as Section 1163(a) and by adding the following new subsections:

      "(b) No airline or person may file a petition for relief under this title for an airline if within thirty (30) days prior to filing such petition the airline suspended or ceased all or substantially all of its scheduled domestic or international airline operations.

      "(c) Once a petition for relief is filed under this title by or on behalf of an airline, and until a trustee has been appointed under subsection (a) of this section, no debtor or debtor-in-possession may suspend or cease all or a portion of its airline operations which were scheduled when the petition was filed. No such operations may thereafter be suspended in whole or in substantial part unless the court, upon motion by the trustee, after notice and hearing, and upon a finding that such suspension or cessation of airline operations is in the best interests of the estate, its creditors and the public authorizes the trustee to suspend or to cease all or a part of the domestic or international airline operations of the debtor."

e. Section 1164. Amend Section 1164 by adding: "the Board," after "The Commission," and before "the Department of Transportation";

f. Section 1166. Amend Section 1166 by adding after "that are applicable to railroads," and before "and the trustee" the following: "or to the provisions of the Federal Aviation Act (49 U.S.C. 1301 et seq.) that are applicable to airlines,";

g. Section 1168.

(i) Amend the heading of Section 1168 to provide as follows: "Rolling stock equipment of railroads";

(ii) Further amend Section 1168 by deleting "The" at the beginning of subsection (a) and adding in lieu thereof: "With respect to a case concerning a railroad, the";

h. Section 1171. Amend Section 1171(a) by deleting "There" at the beginning of the subsection and adding in lieu thereof: "With respect to a case concerning a railroad, there";

i. Section 1172.

(i) Amend Section 1172(a) by:

(a) adding in subsection(a)(1) "or air" immediately after "debtor's rail" each time it "appears in that subsection; and

(b) adding in subsection (a)(2) at the beginning thereof: "(A) in the case of a railroad,"; redisgnating subsections (A) and (B) therein as "(i)" and "(ii)"; and adding immediately before the period at the end of subsection (a)(2)(B) the following: "; or

"(B) in the case of an airline, may include a provision for the transfer of any or all of the properties, flight equipment, or operating authority of the debtor to another operating airline or other entity for continued air operations.";

(ii) Amend Section 1172(b) by adding in lieu of "If" at the beginning of that subsection the following: "With respect to a case concerning a railroad, if"; and

(iii) Amend Section 1172 by adding at the end thereof the following new subsections:

"(d) With respect to a case concerning an airline, if, except for the pendency of the case under this chapter, the sale, transfer or lease of the property or stock of the debtor to an entity other than the debtor or a successor to the debtor under the plan would require prior approval by the Board under a law of the United States, then a plan may not propose such a sale, transfer or lease unless the proponent of the plan initiates an appropriate application for such sale, tranfer or lease with the Board and, within such time as the court may fix, not exceeding 180 days, the Board, with or without modification or condition, approves such application, or does not act on such application. Any action or order of the Board approving, modifying, conditioning, or disapproving such application is subject to review by the court only under sections 706(2)(A), 706(2)(B), 706(2)(C), and 706(2)(D) of title 5.

"(e)(1) In approving an application under subsection (d) of this section, the Board shall require the applying entity to provide a fair arrangement to protect the interests of employees who may be affected by the transaction. Any such arrangement shall include provisions at least as protective of the interests of airline employees as those required under section 405(b)(1) through and including (5) of the Rail Passenger Service Act (45 U.S.C. 565(b)(1)-(5)).

"(2) Nothing in this subsection shall be deemed to affect the priorities or timing of payment of employee protection which might have existed in the absence of this subsection.".

j. Section 1173.

(i) Amend Section 1173(a)(2) by adding after "if" and before "all of the operating railroad lines", the following: ", with respect to a case concerning a railroad," and by adding after "were sold," and before "and the proceeds of such sale" the following: "or with respect to a case concerning an airline, all of the operating property of such debtor were sold,";

(ii) Amend Section 1173(b) by deleting all that follows "the Court shall" and adding in lieu thereof the following: ", with respect to a case concerning a railroad, confirm the plan that is most likely to maintain adequate rail service in the public interest, or with respect to a case concerning an airline, confirm the plan that is most likely to provide safe, efficient and adequate airline service with the least disruption to employees and to creditor interests."

Mr. MINETA. Please proceed.

TESTIMONY OF LINDA A. PUCHALA, PRESIDENT, ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO; HENRY DUFFY, PRESIDENT, AIR LINE PILOTS ASSOCIATION, ACCOMPANIED BY JAMES W. TELLO, ESQ., AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; AND WILLIAM G. MAHONEY, ON BEHALF OF THE BROTHERHOOD OF RAILWAY & AIRLINE CLERKS, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AND AIR TRANSPORT WORKERS UNION OF AMERICA, ACCOMPANIED BY L. J. PHELAN, AIR TRANSPORT DIRECTOR, BROTHERHOOD OF RAILWAY, AIRLINE & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES (AFL-CIO-CLC); AND WILLIAM L. SCHERI, AIRLINE COORDINATOR, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS

Ms. PUCHALA. Thank you, Mr. Chairman.

My name is Linda Puchala. I am president of the Association of Flight Attendants, the largest flight attendant union in the United States, representing approximately 21,000 flight attendants on 14 carriers.

I appreciate the opportunity to present our concerns about the upcoming sunset of the CAB and the uncertain future of several critical functions currently performed by that agency.

Title XVI of the Airline Deregulation Act specifies transfer to other agencies of only certain limited CAB functions at sunset. Other responsibilities, however, absent any mandated transfer, may fall victim to the uncertain future of administrative transfer.

Despite DOT's plan to perform any of these functions under existing authority, we feel that that authority could be legally challenged in some cases. In other cases important CAB functions may be deliberately dropped or weakened.

Therefore, AFA urges legislation which clearly transfers certain critical CAB functions to preserve both the rights of airline workers and the continued safety of the industry after sunset.

Specifically we urge that such legislation address the following concerns:

First, codification of standard labor-protective provisions, the LPP's which have been routinely required by the CAB as a condition of approving major airline mergers, and a mandate that such LPP's be required by the Justice Department as a condition of future airline mergers.

Second, transfer of the CAB's current role in determining the fitness of new carriers.

Third, assure continuance of FAA authority to regulate airport security.

Fourth, transfer of the CAB's current authority for making and enforcing the smoking rules.

Fifth, transfer of CAB's current data-collection function and airline-reporting requirements to DOT.

Sixth, maintenance of CAB funding through December 31, 1984, and transfer of the CAB's current staffing levels to the successor agencies to assure the orderly continuance of vital functions.

Our major concern, of course, is that CAB's sunset legislation should codify the standard LPP's and mandate that the Department of Justice impose such LPP's as a condition of future airline mergers.

At sunset, the Board's authority under section 408 of the Federal Aviation Act is slated to be transferred to the Department of Justice. In carrying out its responsibilities under 408, the CAB has generally imposed LPP's as a condition of approval of consolidation involving section 401 certificated carriers in order to ameliorate the disruptive impact upon employees resulting from the merger.

These LPP's typically provide an orderly procedure for integrating the seniority lists of the two merging employee groups, certain minimal economic benefits to employees who lost their jobs, and binding arbitration to resolve any disputes regarding these provisions.

Since 1950 the CAB has imposed LPP's as a condition of approval in approximately 43 section 408 cases. Continued imposition of LPP's is consistent with deregulation.

AFA has testified repeatedly over the last few years on the need for statutory imposition of LPP's as a condition of CAB merger approval. This need becomes even more critical at CAB sunset as merger approval authority under section 408 transfers to an agency inexperienced in the consideration of the airline worker rights.

Our second concern is that sunset legislation should mandate that section 401 fitness determinations be continued by the Department of Transportation.

Our written testimony deals extensively with this issue and Captain Duffy will address the fitness issue in more detail.

Our third concern is that sunset legislation should insure continuance of FAA authority to regulate airport security. Such authority is now established by reference to air carriers certificated by the Board. At sunset, the Board certification will cease.

Congress clearly did not intend to diminish air safety or the FAA's authority, and the DOT believes that it has sufficient broad authority to continue to regulate airport security.

Nevertheless, we urge that CAB sunset legislation include clarifying amendments to the Federal Aviation Act to insure the FAA's continued authority to regulate airport security. We certainly don't want airport security to get lost in the shuffle.

Our fourth concern is that sunset legislation should transfer the CAB's current authority to promulgate and enforce the no-smoking rules. AFA has some concern about the potential problems that could be created for flight attendants and passengers if the existing passenger protection rules under section 404 are allowed to expire with sunset.

These rules were developed over several decades and represent the CAB's expert judgment as to what protections passengers should be afforded in such areas as lost luggage, overbooking, and particularly no smoking.

The no-smoking rule directly impacts on our membership. AFA has compiled hundreds of reports from flight attendants who have experienced problems in breathing and discomfort in their eyes, nose, and throats. Many have experienced symptoms associated with oxygen deficiency during flight. The cabin environment is an inhospitable one, in terms of air quality. It is dry, it is polluted, particularly while taxiing, and it contains ozone, and it has very limited amounts of fresh air.

Our flight attendants work very hard walking back and forth in what some of us have come to describe as the blue haze. We would recommend the transfer of whatever no-smoking rule the Board finally adopts at the end of its current rulemaking process.

Our fifth concern is that CAB sunset legislation should mandate the present level of airline reporting requirements be retained by DOT.

Several other concerns warrant your attention: we would like to see the transfer to DOT of CAB authority for making determinations in the employee protection program under 43 of the Deregulation Act.

Additionally, the staffing levels and other successor agencies must be adequate to administer the new programs they will receive from the CAB.

Finally, the supplemental appropriations must be passed to fund the CAB through August and September of this year.

In conclusion, we believe that sunset legislation is vital in order to provide the clear statutory authority for continuing many of the important functions currently performed by the CAB.

Thank you for the opportunity to appear, and I will be happy to answer any questions.

Mr. MINETA. Thank you very much. Mr. Duffy.

Mr. DUFFY. Thank you, Mr. Chairman.

I have with me Mr. Jim Tello, who is with our legal department and specializes in CAB affairs.

Since you have our formal submission, let me just speak informally concerning specific recommendations in four crucial areas that will need corrective legislation when the CAB sunsets: Mergers, acquisitions, and seniority protection; fitness and safety; data collection; and consumer protection.

While few in ALPA lament the passing of the CAB and in particular its recent direction, we recognize that some of its regulatory functions were essential to developing the employee and consumer loyalty that built America's commercial airline industry.

We are concerned that in the rush to complete the deregulation mandate that Congress might unwisely terminate all regulations, the good as well as the bad at the same time.

Pilots believe that the Congress should be explicit in detailing the desired functions to specific agencies. As we have learned in the *Bildisco* decision, if the Congress means it, then it should say it in the law so that there will be no question when the matter reaches the courts.

Let me talk first about mergers, acquisitions, and seniority protection. Statutory authority in this area should be consolidated in a new agency or in the Department of Transportation. Both the public and airline employees have interests that demand Government protection when mergers and acquisitions take place. These interests extend beyond the nuances of antitrust law.

For airline employees specifically seniority questions are vital. The use of labor protective provisions developed in the Allegheny

Mohawk merger case have proven effective in diffusing emotional and potentially disruptive situations involving seniority lists. The only thing more devastating to an airline employee than losing his or her seniority would be loss of their certification. More positively, seniority protection has provided the industry with a stable experience and productive work force.

There can be little doubt that professionalism of airline employees has engenered great public confidence and consumer loyalty, and it goes almost without saying has contributed greatly to the outstanding safety record of the industry.

We strongly believe that any legislation must mandate seniority protection for airline employees in all airline mergers and acquisitions without exception.

Corporate reorganizations to create a second airline under common control create the same kinds of concerns for airline employees and should be subject to the same protections.

I will talk about fitness and safety. In my testimony last summer to this subcommittee on the financial problems of the industry, I was less than generous in my comments concerning the CAB's fitness determinations. Just imagine what I would have said if the Air Illinois shutdown had occurred before instead of after my testimony.

If the Congress adopts the DOT recommendation for a procedural, largely paperwork determination of fitness, it will be ignoring the central fact that financial health is directly related to safety. The fitness of new operators must be tested in an open adjudicatory forum where the third parties can present evidence, cross-examine and conduct discovery.

The final determination should be made by an independent judge trained to determine fact and not by a low-level Government official just making certain that all the forms are filled out. We must not have a mail order fitness test.

We believe that DOT should be given the present CAB jurisdiction over fitness determinations and that the Congress should make it clear that it wants a full and open process and not procedural corner cutting and not another Air Illinois.

Now data collection. The Congress should make it clear that the DOT has the authority to continue the collection of specific data from airlines after the sunset of the CAB. This data will help spot potential safety problems arising from unprofitable operations as unprofitable operations deplete capital as well as reducing resources allocations to maintenance and training.

It is also vital for the Government to be able to pass the lessons of airline deregulation to other industries.

Now as to consumer protection, we are not convinced by the DOT contention that no new legislation is needed to continue Federal protection of airline consumers. At the very minimum, the current ambiguity would encourage a testing of wills between State governments desiring to protect their citizens and ideologues desiring to do away with all government regulation.

Federal protection of airline consumers is essential to the industry. It is essential to public confidence and it is essential to save the industry from the unnecessary cost of complying with 50 different State consumer protection laws.

Congress must leave the court no room to rule that there is no clear Federal preemption of State regulation. Further, you should consolidate the domestic airline consumer protections under sections 411 and 404 into the DOT so that one central authority will be responsible for both international and domestic consumer protection.

Mr. Chairman, we are aware that there are some individuals who hope to capitalize on the momentum of deregulation as a means of getting rid of all of regulations regardless of their merits. If the Congress fails to be specific in drafting new legislation, these individuals will seek to use the sunset of the CAB and the opportunity to rid the industry of needed and valued protections for employees and consumers.

We urge this committee to make certain that the interests of the traveling public and airline employees are safeguarded so that we can continue to provide this Nation with efficient and safe airline transportation.

Thank you.

Mr. MINETA. Thank you very much, Captain Duffy. Mr. Mahoney.

Mr. MAHONEY. Thank you, Mr. Chairman.

Accompanying me today are William Scheri, airline coordinator for the International Association of Machinists; L. J. Phelan, director of the Air Transport Division of the Brotherhood of Railway and Airline Clerks who would be pleased to answer any questions you may have after the direct testimony.

President Gill of the Flight Engineers and President Lindner of the TWU express their regrets at not being able to be here today due to scheduling conflicts.

First of all, I would like to say that the labor organizations which I represent agree with Ms. Puchala and also with Captain Duffy on the positions taken before you today and I have no intention of repeating any of those positions.

We believe that certainly with regard to the labor protective provisions that they were overlooked, to be charitable, in the consideration of the Airline Deregulation Act. There was no mention made of them and when the transfer of authority went from the CAB or was designed to go from the CAB to the Department of Justice in 408, why they were not actually considered, at least to my knowledge they weren't and there is certainly nothing in the record to indicate they were.

I have a prepared statement which I ask to be entered into the record, and I will summarize that and try to be brief.

On May 23, 1983, we testified before this subcommittee and since that time and indeed since the law as put on the books thousands of employees who committed their lives to the industry before 1978 have lost their jobs, have had their pay cut, and some of them have been transferred. Some of them had all three happen to them on various occasions, and these pay cuts are deep pay cuts, as you know. Some people are working in this industry for less than 50 percent of what they used to work for.

Now Congress said when they passed this law that they must insure that deregulation was not going to be paid for by a minority of the people and they designated who that minority was. It was the employeees and their families. They knew that the employees, the 1978 employees at least, were going to be hurt.

They said they must insure that the employees not pay for this and went on to say that Congress now had a duty to protect those employees. That was in the Senate report that was adopted by the conference committee and enacted into law.

Now to execute that duty and to provide that assurance, they passed section 43, and that provision of law has proved to be nothing more than a brutal hoax on employees, Mr. Chairman.

It also requires the representatives of the employees to pay tens of thousands of dollars in an attempt to obtain the unobtainable under the law and that is employee protection. No employee has ever been protected in the 6-year history of this law and no employee ever will be protected under this law.

And if the law itself, by its language, is not bad enough, the CAB has taken care of the rest.

Attached to our testimony in May was CAB order 83-4-36. Attached to our testimony of today is CAB order 83-10-29, and I commend to your attention and I ask you to read pages 4 through 7 of that order and any lawyers on this committee might be interested in reading it just to see whether they think that they as lawyers for a group of employees under that statute could obtain any protection whatever in light of what the CAB has done to it by its interpretation.

First of all, as I read section 43, the CAB has a factfinding duty on two points.

First of all, it has to find that there has been a major contraction, that is 7½ percent of the employees of a particular airline, full-time employees, have lost their employment in a given 12-month period.

The second factfinding they must undertake is to determine that the major cause of that contraction was the Airline Deregulation Act, the change in the regulatory structure of the industry.

But the CAB doesn't look at it that way. The CAB stated that Congress wanted a very narrow construction of section 43, and that Congress said so. Now what this means is that the CAB says Congress wanted as few people as possible protected by this law regardless of whether they were hurt by the law. They just wanted as few as possible protected.

Now what they have did to accomplish that, first of all, was to exclude as harmful all of the effects of the Airline Deregulation Act except two, automatic market entry and dormant authority. Now that means that as a matter of law in these hearings before the CAB, the only results that could hurt the employees under the ADA are automatic market entry and dormant authority. All of the rest of it is virtually irrelevant, including the errors of management such as have been admitted in some cases under the law when they couldn't handle themselves in a free market environment.

Second, this is not factfinding. Factfinding is a nonburden of proof type of proceeding as you know. CAB decided to place a burden of proof on the employees, and how did they do that? Did they place the administrative agency burden of proof on them, which is the substantive evidence rule, or rather the substantial evidence rule? No, they didn't. Nor the civil court procedure rule, which is a preponderance of the evidence.

Well, thank God, they didn't go as far as the criminal felony rule which is beyond reasonable doubt. They went to the civil fraud and deportation requirements which is convincing demonstration, and they state that at page 11 of the order that I just mentioned. They require us to convincingly demonstrate that at least 40 percent of the cause, quantifying it, 40 percent of the cause of the adverse effect was due to the act.

Now you have got the PATCO strike, the fuel-price rise, and the recession, and I guess one is 5 percent and one is 15, and I defy anybody to quantify it with that type of proof. Now we know four proceedings are now before the CAB about to go to hearing, and there are four others in the wings, we know that in every one of those cases we are going through a kabuki dance and that is all it amounts to. There is no way the CAB is ever going to find that this act was the major or 40 percent cause of any ill that ever occurred to this industry since 1978.

I wouldn't be surprised if the CAB found that 1978 employees were actually benefited by this thing.

Now you might look at Canada. The Canadian employees have not suffered during this period, not at all. The employment has gone up in Canada and it has been quite stable and only in the last couple of years has it gone down a very little bit as the recession caught up with them. But they have gone through the PATCO strike and they have gone through the fuel-price increase and they have gone through the recession. The only thing they haven't gone through is deregulation, and there is an exhibit attached to our prepared testimony with regard to that.

Now, Mr. Chairman, on January 17 you spoke to the International Aviation Club and you raised a number of concerns that were valid concerns and I think the testimony here today and yesterday has proved that they are very valid concerns. You spoke of consumer protection, and fitness, and so forth, seven or eight very, very important items. They are valid and they should be resolved by appropriate legislation. But there was nothing said about employees. I hesitate to say "where is the beef," but I couldn't resist. [Laughter.]

There was nothing said about employees, or the effect of this act upon the employees or the fact that they will never get any protection out of this act the way it now stands and the way it has been interpreted by the CAB.

You did say something about no special interest add ons, and I kind of felt that might have been aimed at us, but maybe it wasn't. I have heard special interest and labor put together an awful lot these days, too.

In any event, I don't believe that anybody can claim that to do what Congress promised that it was going to do and said it had a duty to do, to actually do that is a special interest add on.

Certainly it would not be a regulation nor would it be reregulation of the industry to see that the employees got the fair and just protection to which they are entitled and to which Congress said they were entitled.

Now, indeed, if Congress didn't intend these employees to be protected really, they should repeal section 43, or at least that part of it dealing with this subject. It would certainly save these organizations that I represent tens of thousands of dollars in fees just chasing meaningless procedures.

If Congress did intend to protect the employees, then we have an amendment, a suggested amendment in our appendix III to our testimony which is consistent with what the Secretary of Labor found with railroad employees in the Amtrak takeover and consistent with what the ICC has always found in all mergers and abandonment cases and we commend it to your favorable consideration.

Also, for your information, because we realize it isn't particularly germane to the jurisdiction of this subcommittee, in our appendix IV we have attached an amendment to the Bankruptcy Act for the purpose of protecting the public from the abrupt cessation of operations by resort to bankruptcy as has occurred in the recent past and also to protect collective bargaining agreements.

Thank you very much and I will be happy to answer any questions.

Mr. MINETA. Thank you very much, Mr. Mahoney.

Ms. Puchala, with regard to fitness determinations, I share your belief that the Government should continue to look at fitness beyond the ability to perform operationally in a safe manner, and that there are important considerations beyond safety. Now FAA, in my opinion, is already stretched pretty thin when it comes to inspectors in the field who now perform FAA's fitness work. You suggest that FAA be given the additional task of determining fitness beyond safety. Should we place this responsibility at DOT rather than FAA?

Ms. PUCHALA. I believe it will be better placed at DOT because FAA doesn't have the staffing nor the expertise to deal with the fitness determination.

Mr. MINETA. With regard to collection of airline industry data after sunset it is my understanding that CAB and DOT have concluded that origin and destination data and service-segment data, as well as other types of financial and cost data associated mainly with form 41 will continue after sunset. Are any of you familiar with the specific plans of the Government with regard to data collection and is the scope of what they plan to do adequate?

Mr. DUFFY. I would like to have Mr. Tello answer that because he has had extensive discussions with DOT.

Mr. MINETA. Fine.

Mr. TELLO. Mr. Chairman, my understanding is that these statements are being made, but no detailed specifics have been made known to us. We have heard rumors that there is some form of grand rulemaking being proposed at CAB, but again no specifics have been made known to us.

Mr. MINETA. You say they are into rulemaking on this?

Mr. TELLO. I say this is a rumor, Mr. Chairman. We have no specific information from either the DOT or CAB as to what their plans are. We have heard the generalities that you suggest that these forms of data will be preserved.

Mr. MINETA. From time to time, we hear reports of where the flight attendants or even the flight deck crew are pitted against a passenger who insists on smoking in a nonsmoking section. I believe there was even an incident last year when the plane made an unscheduled stop in order to discharge such a passenger. Now I imagine there are times when flight attendants would like to be able to discharge passengers without going through the trouble of landing. [Laughter.]

Without Government regulation and uniform standards are we going to see a growth in confusion among passengers over what they are entitled to and is that going to result in increases in these types of incidents?

Linda.

Ms. PUCHALA. Yes; I think that we will have an increase of these incidences if we don't have some transposition of the ultimate rule that the CAB decides on. Unlike the representative before your subcommittee from United, it has been our own practical experience that we have had confrontations on the airplane with respect to smoking and no-smoking sections.

To answer one of the questions that you posed earlier, our understanding is that on the jumbo equipment where there are separate configurations where we can have a no-smoking cabin, that that is indeed in effect.

On smaller aircraft, we designate a certain number of rows and that is by a percentage of the passenger load. If you are one of the unfortunate few that show up at the gate less than 10 minutes before flight time and all of the no-smoking seats are filled, they will usually board you anyway and you are up to your own threats in terms of dealing with the flight attendants to secure a place in the nonsmoking section.

It puts the flight attendant in the position of asking individual passengers to relocate. We are fearful that without some kind of rulemaking transposed in this area that we really are going to have chaos on the airplane because people have come to recognize that they are entitled to a no-smoking section.

Mr. MINETA. Now it is my impression that employees protected under section 43(d) of the Airline Deregulation Act are being given preference in hiring over unprotected employees despite the unfortunate fact that there are only pending regulations in this area that will not become effective until later this spring. Can you provide us your membership's experience in this area? Anyone on the panel?

Mr. MAHONEY. We have heard of no such hiring.

Mr. MINETA. Captain Duffy.

Mr. DUFFY. We have had voluntary compliance on a couple of airlines, Mr. Chairman, Piedmont notably, and to a lesser degree USAir, but they have made it clear that it is just that, voluntary, and I am sure you are aware of the court suit that is now opposing the regulations that are not yet in effect.

No one has voluntarily acquiesced and said we recognize the regulations or we recognize first right of hire.

Ms. PUCHALA. We have virtually no success in getting any of the airlines to even voluntarily comply with first right of hire, and the airlines maintain an unofficial practice that any person applying for a flight-attendant position over the age of 30 is automatically placed in the reject pool.

Mr. **Mineta**. Now with regard to section 408, Captain Duffy, you speak of the need to legislatively impose the seniority integration requirements of Allegheny-Mohawk on mergers. And on page 5 of your testimony you say that such requirements should not only apply to mergers but also to "any transaction which is functionally like a merger or acquisition."

In the last Congress, in pursuit of that concept of functionally like a merger we were trying to specify in legislation what percent of a carrier's aircraft had to be sold, how many other assets had to be transferred, how large route swaps had to be, et cetera, before it was a transaction which should be treated like a merger.

That turned out to be a long contentious and ultimately futile effort. Is there any indication that those types of problems would be any less troublesome in this Congress?

Mr. **Duffy**. I think it is going to be a difficult determination any time you try to make it, but I would only point out that if you recognize Allegheny-Mohawk as it has been applied, it has essentially eliminated labor chaos in our industry for about 35 years now. I mean it has stopped pilot group versus pilot group in my case, but employee group versus employee group.

I think it has been in the public interest the way it has been implemented. I think that it is largely a no-cost procedure. As a matter of fact, it is a cost-savings procedure because it provides an orderly means of integrating the employee groups.

Now as you slide into determinations of percentages of assets and that sort of thing, certainly it gets cloudy, but certainly the same public interest is served and certainly the employee interest is very well served in that.

Let Mr. Tello just add a tag to that, if you would, please.

Mr. **Tello**. We don't suggest by implication that some of the detailed approaches in the last round of legislation are the only ones possible. Perhaps, and I just suggest this as one drafting approach, and it is only a drafting problem, that some form of simple provision in the legislation which says that transactions which are functionally like mergers and acquisitions should be treated the same, and then it would be susceptible to case-by-case determination rather than getting into the kinds of drafting problems we had the last time around.

But again we want to emphasize that is a drafting problem and not a conceptual problem and not a question of principle.

Mr. **Mineta**. One further question regarding section 408; jurisdiction over section 408 is now scheduled to go to the Department of Justice. There is widespread preference for sending authority for sections 412 and 414 to the Department of Transportation rather than Justice. If we do that, do you believe that it would make more sense to have section 408 at Justice or at Transportation?

Mr. Mahoney.

Mr. **Mahoney**. It would seem to me, Mr. Chairman, on those subjects that they both would well be in the same agency to make the determinations on antitrust immunity and to make the determinations on antitrust violations that comes down to it. I haven't given that a tremendous amount of thought, but that is my reaction to your question.

Mr. **Mineta**. Do others on the panel wish to respond?

Mr. DUFFY. We clearly prefer DOT. We think there is going to be a lot more public interest sensitivity in DOT than in DOJ and so that is our clear preference.

Mr. MINETA. What about section 409 having to do with the interlocking directorates? Any thoughts on that?

Mr. TELLO. It is our view that it should go to the same place. The Department of Justice's position is they will exempt all interlocking transactions in industry. This isn't a section of the act that raises a lot of issues for pilots.

Mr. MINETA. Mr. Packard.

Mr. PACKARD. Thank you, Mr. Chairman.

Ms. Puchala, in your testimony, you supported the continuation of CAB's section 404 consumer protection authority but do not state which agency you feel it ought to be transferred to. Do you have any opinion on that?

Ms. PUCHALA. I would say with respect to the no-smoking rules that definitely it should go to DOT.

Mr. PACKARD. In the no-smoking portions of the regulation do you advocate a complete ban on in-flight smoking?

Ms. PUCHALA. Are you a smoker or nonsmoker, sir? [Laughter.]

Mr. PACKARD. I sit in the nonsmoking section.

Ms. PUCHALA. When the CAB was hearing oral arguments last month with respect to the no-smoking rule, our position was that on flights of 1 hour or less we could support a no-smoking ban. If the flight was in excess of 1 hour we felt that there would be too many violations for us to monitor.

Mr. PACKARD. Do you think that that might encourage people to try to smoke in the restrooms and so forth?

Ms. PUCHALA. Unfortunately, yes, that was our position.

Mr. PACKARD. What about a ban on small aircraft or small carriers?

Ms. PUCHALA. On carriers with less than 35 seats, oftentimes there are no flight attendants. So we really did not address the issue on the smaller carriers.

Mr. PACKARD. Thank you.

That is all I have, Mr. Chairman.

Oh, I am sorry. There was one I wanted to ask, if I may, Mr. Mahoney.

Do any of the unions, Mr. Mahoney, which you represent have an opinion as to whether we should retain CAB's existing authority to make financial fitness determinations under title IV and specifically transferring this authority to DOT, do you have an opinion on that issue?

Mr. MAHONEY. I haven't discussed that with any of the clients and they haven't approached me on it.

Mr. PACKARD. OK, fine. Thank you.

Thank you, Mr. Chairman, that is all.

Mr. MINETA. Mr. Lipinski.

Mr. LIPINSKI. Thank you, Mr. Chairman.

I just want to thank all of you folks for being here today. I appreciate hearing your testimony and I specifically wanted to say I appreciate very much your position being only a 1-hour ban on no smoking on flights for 1 hour or less because my flight from the southwest side of Chicago takes 1½ hours to get here and I smoke three cigarettes at least on that flight all the time. So I am very happy to say that I could certainly support the 1-hour ban. [Laughter.]

Thank you very much.

Ms. PUCHALA. I am glad I said something right. [Laughter.]

Mr. MINETA. Well, let me thank the panel for being with us today and making their presentations to us. I know that we will be hearing more about this subject as the next few weeks comes along, and we will be in touch.

Thank you very, very much.

Now I would like to call the next panel made up of Mr. Paul Ruden, counsel of the American Society of Travel Agents; Mr. Barry Roberts, counsel for the Association of Retail Travel Agents; and Mr. Willard R. Brown, vice president of Travel Agency Services of the American Automobile Association.

The full text of your prepared statements will appear in the record at this point.

[Statements referred to follow:]

TESTIMONY OF THE AMERICAN SOCIETY OF TRAVEL AGENTS, INC.

Mister Chairman, the American Society of Travel Agents, Inc. (ASTA) is the world's largest trade association of professional travel agents, with over 12,000 domestic agent members and a total worldwide membership of agents and suppliers of about 20,000. We appreciate the chance to address you about the important issues that face us as the sunset of the CAB approaches.

We will limit our remarks to two issues: (1) jurisdictional issues related to airline agreements and antitrust immunity and (2) issues related to the future of consumer protection regulations.

ASTA's view of the importance of antitrust immunity in the airline industry is well known. We believe that such immunity is necessary to assure the continuation of airline cooperation and coordination that benefits the travelling public. The most immediate example is the travel agency accreditation program operated domestically by the Air Traffic Conference and internationally by the International Air Transport Association. These are the subject of legislation pending before both houses of Congress and will not be discussed in detail here.

Retention of the power to grant antitrust immunity to airline agreements is important for other purposes as well. It will provide a useful measure of flexibility in the event of unforeseen developments following the sunset of the CAB, in situations where competitively sensitive agreements may be necessary in the public interest but thwarted by industry perceptions of legal exposure that overwhelms the private interest in the agreement. The Congress should therefore provide the tools to address these situations effectively.

It might seem that both of these concerns are already addressed in the provisions of the Federal Aviation Act that transfer the authority to approve and immunize agreements from the CAB to the Department of Justice at the end of this year. Unfortunately, the existing arrangements for transfer are unlikely to provide the necessary safeguards and we therefore believe that legislation is essential.

The Department of Justice is by its nature an antitrust enforcement agency and thus not well constituted to consider the public policy issues that arise in connection with requests for immunity as to airline agreements. The Department will have no other on-going policy responsibility for the airline industry and will thus not be as well informed in these respects as an agency that does have such responsibilities.

The Department's ad hoc use of Business Review Letter procedures to state its current enforcement intentions when presented with requests for same is no substitute for the administrative review and expertise that can be accumulated by an agency with broader policy authority for a particular industry. The Business Review Letter inherently focuses on antitrust issues arising under the statutes for which Justice bears primary or sole responsibility for enforcement and can not be expected to serve as an effective substitute for applying the surviving policies of the Federal Aviation Act in the context of an agreement raising complex transportation policy questions.

In documents disclosed in the Department of Transportation's Sunset Plan for the CAB, the fundamental hostility of the Department of Justice to the effective administration of sections 412 and 414 is clearly revealed. The Justice Department's basic view appears to be that sections 412 and 414 have little utility after 1984 and therefore the industry must be discouraged from even seeking relief from the Department thereunder. As a practical matter Justice is saying that "no one need apply" because no immunity will be forthcoming in any case where such immunity will be likely to have meaningful effects in the market.

For all of thse reasons, ASTA believes that legislation should be enacting transferring the section 412/414 jurisdiction from Justice to the Department of Transportation. While DOT appears to be a reluctant recipient of this authority, it remains the proper repository of it, since it alone will have the overall transportation policy responsibility for the air transport industry after termination of the CAB.

ASTA is also quite concerned about the fate of the Board's authority to issue regulations intended to protect consumers, as currently embodied in section 411 of the Federal Aviation Act. We believe that continuation of this function is vital. The most current example of this need is the regulatory scheme currently being considered by the Board for control of computerized reservations services used by travel agents. It is reasonably safe to say that the Board will adopt final rules in this area before the year is out. We have considered DOT's position that the authority to continue those regulations will pass to the Federal Trade Commission and find it questionable at best. The only safe course here is to enact legislation that eliminates any question of the government's ability to continue these rules for such period as is necessary. In any case we believe that the authority to issue such regulations should reside at the Department of Transportation, rather than the FTC, for much the same reasons expressed earlier with respect to the policy responsibilities of the Department of Justice.

We will be pleased to answer any questions that the Committee may have.

Statement of Ronald A. Santana, President, Association of Retail Travel Agents, Ltd.

Mr. Chairman and Members of the Committee, my name is Ronald A. Santana. I am President of the Association of Retail Travel Agents, Ltd., a national trade association comprised of over 1,800 appointed retail travel agencies and over 1,200 individual travel agents located throughout the United States. I am also the owner of two travel agencies in the New York City area. In addition, I am an attorney admitted to practice in New York.

The domestic air transportation industry has long enjoyed a high level of consumer confidence. Historically, when a passenger has purchased a ticket for air transportation either directly from a carrier or through an accredited travel agent, he or she has done so with the assurances that the ticket will be honored for the purchased transportation or that there would be a refund. Carrier interline agreements, settlement plans, and tariff rules all served to provide the consumer with a high level of protection.

ARTA has long favored the deregulation of the airline industry. However, our Association and its member agents are seriously concerned that deregulation may lead to diminished consumer protection and an erosion of consumer confidence in the air transportation industry. When a travel agent sells a ticket to a consumer on behalf of a carrier principal, the agent should do so with the assurance that the passenger will receive the purchased transportation or at least a refund of the ticket price. Our Association wishes to impress upon the Congress the importance of this fundamental concept and urge that legislation be passed that would transfer the consumer protection authority as well as all other residual authority, now vested in the Civil Aeronautics Board, to the Department of Transportation upon the demise of the Board at the end of 1984. In addition, ARTA strongly urges this Subcommittee to consider legislation that would specifically provide for a high level of consumer protection.

In 1981, the Air Traffic Conference of America proposed certain amendments to the Area Settlement Plan that were collectively noted as being a "Default Protection Plan." Our Association opposed the adoption of this plan for the simple reason that rather than give the consumer additional protection, it actually diminished the rights of consumers to obtain substitute transportation or a refund when a carrier on which a ticket was written failed to provide the specified service. Prior to the adoption of the "Default Protection Plan", travel agents could freely issue refunds to consumers and then table a credit against other sales on their weekly reports under the Area Settlement Plan. The "Default Protection Plan" essentially prohibited travel agents from issuing refunds and taking the proper credit against sales once ATC had declared a carrier to be in default. The so-called "Default Protection Plan" provided that other carriers would honor tickets on the defaulting carrier under such terms and conditions as they chose. In most cases, this meant that passengers holding confirmed reservations on a defaulting carrier would take their chances as standby passengers on other carriers. The plan only served to protect non-defaulting carriers at the expense of travel agents and the public.

When Braniff Airlines went into bankruptcy in 1982, many passengers were able to use their Braniff tickets and obtain service on other carriers, principally on a standby basis. However, other passengers holding Braniff tickets were either unwilling or unable to take the risk of flying standby, and were left holding worthless tickets. Likewise, many travel agents lost money either because they provided refunds to their customers and absorbed the loss or were unable to collect money owed from customers for tickets sold on Braniff. While we do not know the exact amount of these losses, they are believed to be substantial.

In September, 1983, Continental Airlines filed for reorganization under Chapter 11 of the Bankruptcy Act. All domestic service was suspended for two days and, when Continental resumed domestic service it had eliminated large numbers of routes. Immediately upon filing for bankruptcy, Continental, with the acquiescence of the ATC, obtained an injunction prohibiting the processing of refunds or ticket reissuances through the Area Settlement Plan. Thus, many passengers were left holding worthless Continental tickets, and travel agents were unable to provide refunds. ARTA intervened in the Continental bankruptcy proceeding in an effort to impress a trust upon monies received by Continental for the sale of tickets for which service would not be provided. ARTA is seeking to establish the right of passengers to obtain refunds when a carrier chooses not to provide service, and for such right to survive the bankruptcy filing. ARTA believes that when a common carrier accepts money from the public for the promise of future transportation, that money is being held in a fiduciary capacity until such time as the promised service is provided.

Continental sold tickets on discontinued routes until the very last moment before its bankruptcy filing. It appears that Continental took money from the public based on the promise that air transportation service would be provided, when in fact its management knew, or should have known, that such service would not be provided.[1] Nevertheless, pursuant to the bankruptcy laws and the lack of any consumer protection legislation or regulation clearly providing that an air carrier holds the public's money in trust until it provides service, Continental has been allowed to finance its reorganization with the public's money.

There can be little doubt that deregulation has led to intensified competition in the air transportation industry. New carriers are being organized and commence operations each year. Many new carriers appear to be insufficiently capitalized, and there is a strong incentive for them to use money received from the public for the advance sale of tickets in lieu of working capital. Moreover, it is well known that many long established carriers are operating at a loss and may be in substantial financial difficulty. Here too, there is a strong incentive for carriers to sustain operations with money received from advance ticket sales. At present, there is nothing to prevent a carrier from mounting a major promotional and sales campaign and taking in millions of dollars from the public for the sale of advance tickets and then seeking protection of a bankruptcy court and discontinuing many of the routes for which tickets were sold. It should be noted that Continental was solvent at the time it filed for Chapter 11 reorganization.

The recent Supreme Court decision in *National Labor Relations Board* v. *Bildisco*, gave air carriers and other businesses in financial difficulties further encouragement concerning the bankruptcy laws. We believe it important to recognize that the public stands in a difficult position vis-a-vis air carriers from employees, suppliers, and other contractors. Congress should make it clear that members of the public purchasing air transportation in advance should not be treated as mere general creditors when an air carrier elects to file bankruptcy. To the extent that amendments to the Bankruptcy Code may be needed, this Subcommittee should recommend legislation to the appropriate House and Senate committees.

We strongly urge the Congress to enact legislation that would provide consumers of air transportation with a sufficient measure of protection against the loss of their money taken by a carrier for service which is never provided. We believe that the

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[1] The Attorney General of the State of Texas has suggested that Continental took consumer funds under false pretences.

Civil Aeronautics Board presently has the authority under the Consumer Protection Provisions of the Federal Aviation Act, including section 411, to adopt regulations requiring that money received by carriers for the sale of tickets shall be deemed impressed with a trust or held in escrow until such time as the purchased service is actually provided. Indeed, the board's existing regulations concerning charter operations specifically provides for the escrow treatment of customer deposits. See 14 C.F.R. § 207.17 (1983). ARTA believes that similar regulations are now appropriate for all domestic air transportation.

Under the Airline Deregulation Act of 1978, the Civil Aeronautics Board will cease to exist effective January 1, 1985. The authority to enact and enforce consumer protection regulations under section 411 of the Act is left in limbo. It is not transfered to any successor agency, and it is most unclear whether any agency or public body will have the authority to adopt and enforce regulations for the protection of the public. The status of existing consumer protection regulations, such as the charter escrow provision cited above is in doubt. We believe that Congress should enact legislation to ensure the continuence of section 411 of the Act and vest the authority to adopt and enforce regulations thereunder in an agency concerned with the integrity of the nation's air transportation system as well as consumer fairness. ARTA believes that the Department of Transportation is the appropriate agency to receive the continued authority under section 411 of the Federal Aviation Act. In enacting such legislation, ARTA strongly urges the Congress to make it clear to DOT that regulations for the protection of the public purchasing future air transportation should be adopted. Congress should, if necessary, legislate on this issue directly.

The statute or regulations protecting the public from the loss of money taken by carriers in the promise that future air transportation and service would be provided could take one of many forms. As is noted above, it could be provided that such money shall be impressed with a trust at the time it is taken by the carrier and not be considered the carriers property until such time as service is actually provided. Similarly, it could be required that funds actually be placed in an escrow account similar to that required of charter operators.

In 1966, Congress added a provision to the Shipping Act requiring that cruise lines operating from United States ports file with the Federal Maritime Commission a bond for the protection of the public. 46 U.S.C. § 817(e). This bond is intended to ensure that passengers will receive a refund if the promised transportation service is not provided. This legislation offers another possible solution to the problem of providing financial protection to the public for the failure of air carriers to provide promised service. In lieu of enacting legislation or providing for the adoption of regulations declaring that money paid for future air transportation is impressed with a trust or to be placed in an escrow account, Congress could enact legislation similar to that in the Shipping Act requring that air carriers file a bond for the protection of the public.

Subsequent to the Continental Airline's bankruptcy, the ATC "Default Protection Plan" fell apart. Numerous carriers rejected the idea of even providing service on a standby basis to holders of tickets on defaulting carriers. One-by-one, the carriers withdrew from the Default Plan so that today there are almost no participants. As a practical matter, the Default Protection Plan no longer exists.

It is unlikely that the carriers will be able to agree on a meaningful default plan. ARTA has proposed that the Civil Aeronautics Board either require the carriers to adopt a workable plan or withdraw antitrust immunity from the Area Settlement Plan. ARTA has suggested the establishment of a consumer protection fund by a 15 cent per ticket charge, part to be paid by the carrier and part by the agent. This fund would be available to pay for substitute transportation in the event of a carrier default. ARTA recognizes that other plans may also provide an equivalent measure of consumer protection. The public interest requires that some meaningful and workable plan be adopted.

The continuance of section 411 authority in the Department of Transportation is in no way contrary to the spirit of deregulation. Indeed, regulations requiring that carriers treat the public fairly would only enhance competition. ARTA strongly believes that section 411 authority should be vested in the Department of Transportation rather than in any other federal agency. The Airline Deregulation Act of 1978 already transfers to DOT authority now exercised by the Civil Aeronautics Board in connection with international aviation. Consumer protection problems in domestic and international aviation tend to be similar. It would be most incongruous to have one agency responsible for the issuance and enforcement of regulations concerning charter flights to Europe and another agency responsible for charter flights to Hawaii. Moreover, the line between domestic and international air transportation is not always easy to discern. The Department of Transportation would be expected to have a consistent consumer protection policy applicable to all air transportation. ARTA also believes that the Department of Transportation is the appropriate repository for authority under Sections 412 and 414 of the Federal Aviation Act. Carrier agreements should be reviewed and considered for their impact upon the transportation system. The Department of Justice is now due to receive Section 412 and 414 authority upon the sunset of the CAB. It would be more appropriate to have this authority vested in an agency concerned primarily with transportation policy. ARTA strongly urges legislation to transfer this authority to DOT rather than the Department of Justice.

For the foregoing reasons, the Association of Retail Travel Agents, Ltd. respectfully requests the Congress to enact legislation that would transfer all authority for both domestic and international aviation under sections 411, 412 and 414 of the Federal Aviation Act to the Department of Transportation following the demise of the Civil Aeronautics Board. In addition, the Congress should enact legislation or require that regulations be adopted to protect the public from the loss of monies paid to air carriers for future transportation.

TESTIMONY OF WILLARD R. BROWN, VICE PRESIDENT, TRAVEL AGENCY SERVICES, AMERICAN AUTOMOBILE ASSOCIATION

Mr. Chairman, I am Willard R. Brown, Vice President of Travel Agency Services for the American Automobile Association.

The AAA was founded in 1902 and is one of the largest travel organizations in the world, serving its more than 24 million members through a network of 777 accredited travel agency locations.

Triple A agencies offer complete domestic and foreign transportation arrangements including those by plane, ship, train, and motorcoach. We also handle cruise reservations and documentation worldwide and provide our members and the public with travelers checks; accident, automobile, baggage and marine insurance; in the area of personal monetary security we have our own airline and tour operator default protection programs for which participating AAA clubs bear the entire cost. AAA also furnishes domestic and international car rentals, issues international driving permits and customs documents on automobiles operated by Americans abroad and offers passport and visa assistance.

Mr. Chairman, Triple A welcomes this opportunity to appear before you and your distinguished subcommittee on the matter of sunset of the Civil Aeronautics Board. We continue to support airline deregulation and believe that CAB sunset is an essential logical step in the deregulatory process which will facilitate further entry of the airlines into a more competitive environment.

With the range of services which I have just mentioned, AAA has serious concerns about the fate of certain CAB functions after sunset of the Board and these concerns center entirely on the welfare and well being of the air travel consumer.

The Airline Deregulation Act (ADA) is quite specific about the transfer of some of the CAD's functions: for instance, the Department of Transportation is scheduled to assume authority over foreign air transportation issues, essential air service, and airline employee protection while the Department of Justice is to assume jurisdiction over airline joint agreements.

The fate of other responsibilities, particularly those relating to domestic consumer protection and financial fitness is, however, far less clear. The ADA does not effectively transfer the authority in these important areas, and it therefore may be assumed that they could also sunset along with the Board. The Transportation Department has stated in its plan for Board sunset that although the Act itself does not actually transfer these authorities, DOT and the Federal Trade Commission have sufficient existing statutory power to perform virtually all of the duties currently carried out by the CAB. According to DOT, the FTC would handle most of the domestic consumer protection responsibilities.

As you know, however, and as DOT acknowledges in its plan, the FTC is specifically barred from regulating airline practices. With all due respect to the Department of Transportation, AAA does not believe that issues as important as consumer protection should be left to wishful thinking.

The importance of the Board's consumer protection functions cannot be overemphasized. As the CAB states in its January 31, 1984 Report to Congress: "The Board is responsible for ensuring that the consumer perspective is represented in all matters which it considers. Through its rulemaking process it identifies industry problems and prepares opinions and regulations designed to balance encouraging industry flexibility against protecting consumers."

Many of the elements of a successful airline flight which air travelers have taken for granted in the past and even up to this point in time are the result of the CAB's consumer protection activities . . . For example, the list includes baggage liability, smoking rules, charter protection, overbooking and denied boarding compensation regulations, notice of terms of contract.

Through its consumer protection authority, the Board has been in an excellent position to initiate proceedings in such current areas as airline bankruptcies and the recent decision of some carriers to change or withdraw from the traditional multilateral interline agreements.

The argument has been made that competition among the airlines will prevent consumer abuses from getting out of hand. While AAA agrees that the new competitive environment provides a strong inducement for carriers to implement different marketing and other business practices which affect the consumer, we support the Board's statement in its report to the Congress that: "Competition will generally be the best protector of the consumer, but in those instances where practices limit competition or competitive incentives rebound to the consumer's detriment, an effective presence consisting of cogent rulemaking and innovative enforcement activity, suplemented by efficient consumer complaint handling, will be necessary to protect the public."

AAA believes therefore that the Board's consumer protection responsibilities should be specifically transferred by legislation to a successor agency.

Suggestions have been made to simply amend the FTC Act to permit that agency to regulate the trade practices of airlines. While this may resolve the issue of whether any agency would have authority over domestic consumer protection, AAA does not believe that it is the best solution.

The Department of Transportation will have authority for consumer protection as it relates to international aviation. If the FTC were to assume domestic authority, two separate federal agencies would be regulating the same industry in the same area of responsibility.

Such a situation would necessitate coordination between the two agencies, both of which might have their own ideas about implementing and enforcing separate consumer protection policies.

Not only would this arrangement be confusing to the airlines and the public, but AAA feels that it would also be a waste of taxpayer-financed agency time and personnel.

AAA also questions whether the FTC has an appropriate understanding of the sometimes special characteristics of consumer protection in the transportation service industry.

For these reasons, AAA believes that the Board's domestic consumer protection authority should be transferred to the Department of Transportation. AAA also feels that fianancial standards as they apply specifically to protection of consumer dollars are nonexistent but are a subject which should be quickly and firmly dealt with by the Department of Transportation.

AAA also believes that the CAB's authority under sections 412 and 414 of the Federal Aviation Act—namely the matters of airline agreements and antitrust immunity—should be transferred to the DOT rather than the Department of Justice. In this respect, we believe that the DOT is better qualified to judge whether potentially anticompetitive transportation agreements are justified or needed in serving the public interest when it comes to the matter of air transportation.

In short, AAA agrees with the CAB when it notes in its 1984 Report to Congress that "Spreading the functions over five agencies (if the FTC is given jurisdiction over the present section 411 areas) will doubtless involve difficult transitions, inefficiencies, and overlap of jurisdiction."

In summary, Mr. Chairman, Triple A's concerns as they relate to sunset of the Civil Aeronautics Board and the continued provision of safe, convenient and economically feasible air transportation on behalf of its more than 24 million members and the general public rest in three critical areas. These include, in their order of importance:

(1) Financial fitness as it pertains to the security of consumer payments for air passenger transportation;

(2) Retention of an efficient and integrated air transport system through the continuation of multilateral or even bilateral interline agreements which facilitate the carriage of passengers and their personal baggage by air; and

(3) An ongoing sensitivity to, and the administration of, consumer protection interests and considerations by a department of the federal government which should

be expected to maintain a record of consumer complaints and exercise appropriate authority in taking speedy action to satisfy the needs and desires of the American public in air transportation.

I am prepared to address any one or all of these areas in much greater detail and will provide recommended actions or procedures at the pleasure of the committee.

However, Mr. Chairman, most critical at the moment is AAA's request that your subcommittee act vigorously in dealing with the potential problems which are presently inherent in the Airline Deregulation Act of 1978 by urging and approving appropriate legislation to transfer domestic consumer protection, financial fitness as it relates to the security of air traveler funds and the authority over airline agreements including interline agreements along with the power to grant immunity from the workings of the antitrust laws to the Department of Transportation. In so doing, Mr. Chairman, you and your distinguished subcommittee will have taken a giant step in encouraging and facilitating the progress of airline deregulation toward a fully competitive environment in a very positive and progressive manner.

This concludes my formal testimony. I will be very happy to try to respond to any questions which you or the subcommittee may have at this time.

Mr. MINETA. Please proceed.

TESTIMONY OF WILLARD R. BROWN, VICE PRESIDENT OF TRAVEL AGENCY SERVICES, AMERICAN AUTOMOBILE ASSOCIATION; PAUL M. RUDEN, ESQ., WILNER & SCHEINER, REPRESENTING RICHARD KNODT, PRESIDENT OF THE AMERICAN SOCIETY FOR TRAVEL AGENTS; AND BARRY ROBERTS, ESQ., HOLLAND & KNIGHT, REPRESENTING RONALD A. SANTANA, PRESIDENT OF THE ASSOCIATION OF RETAIL TRAVEL AGENTS

Mr. RUDEN. Thank you, Mr. Chairman.

Mr. Knodt was called away due to the passage of time and asked me to stand in for him, and with your permission I will do so.

I will summarize very briefly the testimony which we have submitted because we are only going to talk initially about two issues.

One is the question of the Government's authority to approve and immunize from the antitrust laws interairline agreements. It is ASTA's view, as the testimony says, that this authority should be in the hands of a single agency of the Federal Government that is also responsible for developing and implementing transportation policy.

Therefore, this authority should go to the Department of Transportation, and to achieve that result legislation in this session of Congress is clearly necessary.

It is also ASTA's view that the Government should retain the authority to issue regulations to protect the consuming public. This authority is now embodied in section 411 of the Federal Aviation Act, and in our judgment this authority will expire at the and of this year.

Therefore, if the authority is to be retained in the Federal Government, legislation is essential. The clearest example of the need for these regulations, or for the authority to issue these regulations, is the computerized reservations system rulemaking which is now underway at the CAB and which we are confident will result in some rules before the year is out.

If action isn't taken with respect to section 411, those rules will expire at the end of the year and this is an area in which we think the Government cannot responsibly leave the industry in limbo.

Having made clear our position on those two important issues, I will stop and take any questions when the panel has concluded.

Thank you.

Mr. **Mineta**. Mr. Roberts.

Mr. **Roberts**. Thank you, Mr. Chairman and members of the subcommittee.

We appreciate the opportunity to appear here today.

First of all, I would like to say that we, too, support the transfer of all residual authority that the CAB now has to the Department of Transportation, and that would include the authority under sections 404 and 411, the consumer protection authority and the 412 and 414 authority.

We would like to focus very briefly on a particular consumer protection problem that we would like to make certain the subcommittee, and indeed the Congress as a whole considers as part of the CAB sunset. This problem has to do with the right of a passenger who pays for an airplane ticket to either obtain the purchased transportation or receive a refund for the money paid. Historically passengers' rights in this area have been protected.

We are very much afraid that that may no longer be the case today. When a travel agent sells a ticket to a passenger the travel agent should be able to do so with the assurance that the passenger will receive the transportation or at least a refund of the ticket price.

For a period of time the air traffic conference had a so-called default protection plan, and this plan provided that carriers would honor the tickets of a defaulting carrier essentially on the terms and conditions that they set.

Our organization was not in favor of that plan because we felt that it only protected the nondefaulting carrier at the expense of the public and travel agents.

Essentially carriers accepted the tickets of a defaulting carrier on a standby basis. Whatever good that plan may have provided, it is now gone. Most major carrier participants have pulled out of the plan and there is now no protection for the public in the event of a carrier defaulting and not providing service.

We are particularly concerned about the situation that arises when a carrier takes money from the public with a promise that service will be provided and then goes into bankruptcy. That is precisely what happened in the case of Continental Airlines. It is known that Continental continued to sell tickets, right up until filing for bankruptcy, on routes that were then discontinued. And as a result of the bankruptcy laws the public could not get a reissuance of those tickets on another carrier nor could they get a refund. They stood in line as general creditors or are now standing in line as general creditors as the bankruptcy proceeding continues.

With deregulation the competitive situation has and will continue to intensify. New carriers may or may not be adequately capitalized and it certainly is well known that many long established carriers are in financial difficulty.

There is a real incentive for carriers to sell advance transportation and take in a lot of money from the public without any real guarantee that the public is going to get the transportation or its money back. We think that there ought to be consumer protection regulations that would in effect guarantee transportation or a refund of money or if needed, this committee and the Congress as a whole should look into legislation.

Certainly the recent *Bildisco* decision of the Supreme Court gave further encouragement to business in the bankruptcy area.

We believe that under sections 404 and 411 of the Federal Aviation Act the Civil Aeronautics Board or a successor agency, which we think should be the Department of Transportation, would have the authority to adopt regulations requiring that moneys received by carriers for the sale of advanced transportation shall be deemed impressed with a trust or even held in an escrow until the purchased service is actually provided. Of course, right now the Board does have regulations requiring that money taken for charter flights be held in escrow until the service is provided.

We think that there ought to be some similar protection for all passengers given the state of the industry.

Another possible protection for the public would be similar to what we now have in the cruise ship area, and that is where by statute, cruise lines calling at U.S. ports must post a bond for the protection of the public. This is implemented by regulation of the Federal Maritime Commission.

Our association has proposed to the Board that in lieu of the now failed default protection plan that there be a consumer protection fund established by a 15-percent per ticket charge, part to be paid by the carrier and part to be paid by the travel agent. The fund would be available to pay for substitute transportation in the event a carrier goes under.

We believe the problem is acute. We certainly want to see that it is addressed either through consumer protection regulations, which is one of the reasons that we are asking that the authority to issue regulations be maintained and why it be passed to a successor agency which we believe should be the Department of Transportation, or if necessary the Congress to enact special legislation.

If in the case of bankruptcy this committee believes that additional legislation or amendment is needed for the bankruptcy laws, we would certainly request this subcommittee recommend the enactment of such legislation to the appropriate committees of the House and Senate.

With that I will be free to answer any questions.

Thank you.

Mr. **Mineta**. Mr. Brown.

Mr. **Brown**. Thank you Mr. Chairman. The AAA was founded in 1902 and is one of the largest travel organizations in the world serving its more than 24 million members through a network of what is now 777 accredited travel agency locations.

AAA agents offer a complete domestic and foreign travel service, including arrangements by plane, ship, train, and motor coach. We also handle cruise reservations and documentation worldwide and provide our members and the public with travelers checks, accident, automobile, baggage, and marine insurance.

In the area of personal financial security, we have our own airline default protection plan and our own tour operator default protection plan. On the airline default protection plan, Continental's 2 days cessation of service resulted thus far in in our paying over $430,000 in claims.

AAA also furnishes domestic and international car rentals, issues international driving permits and customs documents on automobiles that are operated by Americans traveling abroad, and we also offer assistance with respect to the obtaining of passports and visas.

Mr. Chairman, AAA welcomes this opportunity to appear before you and your distinguished subcommittee on the matter of sunset of the Civil Aeronautics Board.

We continue to support airline deregulation and believe that CAB sunset is an essential, logical step in the deregulatory process which will facilitate further entry of the airlines into a more competitive environment.

With the range of services which AAA provides namely the services that I have just mentioned, we have a very serious concern about the fate of certain CAB functions after sunset of the Civil Aeronautics Board and these concerns center entirely on the welfare and well-being of the air traveling consumer.

The Airline Deregulation Act or ADA is quite specific about the transfer of some of the CAB's functions. For instance, the Department of Transportation is scheduled to assume authority over foreign air transportation, essential air service, and airline employee protection while the Department of Justice is to assume jurisdiction over airline joint agreements.

The fate of other responsibilities, particularly those relating to domestic consumer protection and financial fitness is, however, far less clear.

As I go on, Mr. Chairman, I will be referring to financial fitness with respect to the protection of the consumer's dollar in air transportation, but at the same time AAA also has much awareness of financial fitness insofar as it relates to the transfer of authority to the FAA with respect to safety.

The ADA does not effectively transfer the authority in these important areas and it therefore may be assumed that they could also sunset along with the Board.

The Transportation Department has stated in its plan for Board sunset that although the act itself does not actually transfer these authorities, DOT and the Federal Trade Commission have sufficient existing statutory power to perform virtually all of the duties currently carried out by the CAB.

According to DOT, the FTC would handle most of the domestic consumer protection responsibilities.

As you know, however, and as the Department of Transportation acknowledged in its plan, the FTC is specifically barred from regulating airline practices. With all due respect for the Department of Transportation, the AAA does not believe that issues as important as consumer protection should be left to wishful thinking.

The importance of the Board's consumer protection functions cannot be overemphasized. As the CAB states in its January 31, 1981 report to Congress, and I quote:

> The Board is responsible for ensuring that the consumer perspective is represented in all matters which it considers. Through its rulemaking process it identifies industry problems and prepares opinions and regulations designed to balance encouraging industry flexibility against protecting consumers.

Many of the elements of a successful airline flight which air travelers have taken for granted in the past and even up to this point in time are the result of CAB's consumer protection activities.

For example, the list includes baggage liability, smoking rules, charter protection, overbooking, denied boarding compensation regulations, notice of terms of contract, and so forth.

Through its consumer protection authority the Board has been in an excellent position to initiate proceedings in such current areas as airline bankruptcies and the recent decision of some carriers to change or withdraw from the traditional multilateral interline agreements.

The argument has been made that competition among the airlines will prevent consumer abuses from getting out of hand. While AAA agrees that the new competitive environment provides a strong inducement for carriers to implement different marketing and other business practices which affect the consumer, we support the Board's statement in its report to Congress that:

> Competition will generally be the best protector of the consumer, but in those instances where practices limit competition or competitive incentives rebound to the consumer's detriment, an effective presence consisting of cogent rulemaking and innovative enforcement activities supplemented by efficient consumer complaint handling will be necessary to protect the public.

Suggestions have been made to simply amend the FTC Act to permit that agency to regulate the trade practices of airlines. While this may resolve the issue of whether any agency would have authority over domestic consumer protection, AAA does not believe that it is the best solution.

The Department of Transportation will have authority for consumer protection as it relates to international aviation. If the FTC were to assume domestic authority, two separate Federal agencies would be regulating the same industry in the same area of responsibility.

Such a situation would necessitate coordination between the two agencies, both of which might have their own ideas about implementing and enforcing separate consumer protection policies. Not only would this arrangement be confusing to the airlines and the public, but AAA feels that it would also be a waste of taxpayer financed agency time and personnel.

AAA also questions whether the FTC has an appropriate understanding of the sometimes special characteristics of consumer protection in the transportation service industry and in particular transportation by air.

For these reasons, Mr. Chairman, AAA believes that the Board's domestic consumer protection authority should be transferred to the Department of Transportation.

AAA also feels that financial standards as they apply specifically to the protection of consumer dollars are nonexistent but are a subject which should be quickly and firmly dealt with by the Department of Transportation.

AAA also believes that the CAB's authority under sections 412 and 414 of the Federal Aviation Act, namely, the matters of airline agreements and antitrust immunity should be transferred to DOT rather than to the Department of Justice. In this respect we believe that the Department of Transportation is better qualified to judge which potentially anticompetitive transportation agreements are justified or needed in serving the public interest when it comes to the matter of air transportation.

On that point, Mr. Chairman, we believe that DOT would deal with this subject in a more real world sense as opposed to theory.

In short, AAA agrees with the CAB when it notes in its 1984 report to Congress that, and I quote again "Spreading the functions over five agencies, if the FTC is given jurisdiction over section 411 areas will doubtless involve difficult transitions, inefficiencies and an overlap of jurisdiction."

In summary, Mr. Chairman, AAA's concerns as they relate to sunset of the Civil Aeronautics Board and the continued provision of safe, convenient, and economically feasible air transportation on behalf of its more than 24 million members and the general public rest in three critical areas. These include in their order of importance: First, financial fitness as it pertains to the security of consumer payments for air passenger transportation. Again, we would like to emphasize that we feel that even ahead of that, however, is the financial fitness as it relates to the safe operation of aircraft in this country and around the world.

Second, in our order of importance we believe that there is great need for the retention of an efficient and integrated air transport system through the continuation of multilateral or even bilateral interline agreements which facilitate the carriage of passengers and their personal baggage by air.

Third, we believe that it is very important that there be an ongoing sensitivity to and the administration of consumer protection interests and considerations by a department of the Federal Government which should be expected to maintain a record of consumer complaints and excercise appropriate authority in taking speedy action to satisfy the needs and desires of the American public in air transportation.

I am prepared to address any one or all of these three areas in much greater detail and will provide recommended actions and procedures at the pleasure of the committee.

Mr. Chairman, most critical at the moment, however, is that we appeal to the subcommittee to act vigorously in dealing with potential problems which are presently inherent in the Airline Deregulation Act of 1978 by urging and approving appropriate legislation to transfer domestic consumer protection and financial fitness as it relates to the security of air traveler funds and the authority over airline agreements, including interline agreements along with the power to grant immunity from the workings of the antitrust laws to the Department of Transportation.

In so doing, Mr. Chairman, you and your distinguished subcommittee will have taken a giant step in encouraging and facilitating the progress of airline deregulation toward a fully competitive environment in a very positive and progressive manner.

This concludes my formal testimony and I will be very happy to try to respond to any questions which you or the subcommittee may have.

Thank you, sir.

Mr. MINETA. Thank you very much, Mr. Brown.

Since travel agents are on the frontline, so to speak, in dealing with the traveling public, what types of consumer problems do they hear most about? I am wondering, if in your conversations with your clients what kind of consumer problems or complaints do you primarily hear about?

Mr. **Brown**. The greatest concern that we are hearing from the public now lies in the financial security area of their funds. They are aware of some of the bankruptcies that have occurred, the cessation of operations of Altair, Braniff, and others. So that seems to us to be the major concern.

Another area is the reliability of fares. I don't think, Mr. Chairman, that the public as yet realizes what would happen with a cessation of the interlining system where they would have to handle their own baggage and do their own thing on connecting flights and that sort of thing.

Right now the major concern, however, lies, as far as our agents are concerned, in the monetary area, namely the public's funds. The agents themselves have tremendous concerns in keeping up with the complexity of air fares and that kind of thing which you have heard about, I am sure, more than you would care to hear. But the major concern is in the financial area from the consumer's point of view.

I respectfully submit that I don't think anyone has really bitten the bullet on that one yet anywhere. I have read the DOT report and I have observed what is going on. We filed in response to the DOT petition with the CAB. We are participants in the airline default protection plan task force which is trying to do something, but we predict it may not be successful because of differences of opinion on the part of carriers under deregulation.

I am afraid, Mr. Chairman, that the buck in that area is going to stop right here in front of you and we appreciate your patience, tolerance and understanding in that area.

Mr. **Mineta**. Well, I see that we have been joined at the table by Mr. Knodt who, as I recall, still does have an agency out in San Diego. I was saying a little earlier, Mr. Knodt, that the travel agents are really on the frontline of dealing with the traveling public, and I was wondering what type of consumer problems you travel agents hear most about?

Mr. **Knodt**. Excuse my absence, Mr. Chairman.

Mr. **Mineta**. No problem.

Mr. **Knodt**. I tend to agree with Mr. Brown. The key is trust in a travel agent. It is a trust and it is a service business. We have to insure that the tickets that are sold are acceptable the way we sell them all over the world and that the service is good. Putting a question in the minds of the consumers whether that ticket is a good ticket or a bad ticket and whether it is going to get you where you have designated you want to go—I think that is an issue in many of the areas that we have been before this committee before.

The financial stability and the protections that we consider the traveling public deserves are also important. As deregulation goes on we continue to want to protect that financial stability of our industry so that an agent in the frontline can always, when he passes that ticket across, can know exactly that it is acceptable and it is good anywhere in the world, and that type of scenario. I think that is the most important.

In many areas of consumer protection, the no-smoking rules, I believe many of the agents in the community are just divided on the economic theory of whether the marketplace would take care of that. In other words, if the Government orders no-smoking rules, would the carriers do it anyway?

I think the thrust there is maybe—just maybe—you want to experiment with a certain amount of that, whether no-smoking rules are necessary or is baggage a liability. Just maybe you want to do that. I don't know if we have a position on it. But the thrust here is: If the experiments do not work, we feel very strongly that everything should be in the hands of one department who has an overall umbrella over this whole issue of transportation. We believe the people we would go to then should be the Department of Transportation.

Mr. ROBERTS. Mr. Chairman.

Mr. MINETA. Mr. Roberts.

Mr. ROBERTS. This question of whether the consumer will get what he or she pays for is what is critical to the agents I have talked to, and why as an association we decided to focus our testimony on this problem.

Increasingly we are seeing a wide variety of advanced purchased fares and increasingly the agents I talk to say that the customers want to know are they going to be there to fly and what if they don't and what is the ticket good for?

An awful lot of people got burned on both Braniff and Continental and it is a situation that we probably haven't seen the last of. We, too, are active in the task force to try and come up with a workable default plan. We have proposed one, as I have outlined in our testimony, but we feel that it is imperative that either through regulation or if needed legislation that the public be protected.

Airlines tickets for most people are big ticket items. No pun intended there. It represents a substantial part of the household budget for people traveling on personal business and the integrity of the tickets of course is important for the business traveler.

The extent to which travel agents are now talking about this problem is really quite shocking because it was not a problem a few years ago. With the competition I think everybody recognizes that in a freely competitive environment there are going to be winners and there are going to be losers, and we feel that to the extent that entrepreneural mistakes are made, they ought to be paid for by the entrepreneurs and not by the person who buys the ticket expecting to fly next week only to be told that you are a general creditor in a bankruptcy proceeding.

Mr. MINETA. Mr. Knodt, you might have answered a piece of this, but do you have any impression as to how the traveling public would react to Government consumer protection responsibilities being split between major agencies as proposed by the administration?

Mr. ROBERTS. Mr. Chairman, I don't think the public would be able to understand why they would have one set of rules that might govern their trip to Europe and another set of rules that might govern their trip to Hawaii. I am assuming that the consumer protection responsibilities with respect to international aviation will be lodged in the Department of Transportation.

They will be even more confused when they perhaps take a flight from an interior point to a gateway and then don't know why——

Mr. **Mineta**. Let's imagine they start at an essential air service point.

Mr. **Roberts**. They start at an essential air service point and at what point one set of rules takes over and the other one doesn't. We made the point, for example, just take the simple CAB charter regulations that you have today, and why the person who buys a charter ticket on a flight to Hawaii should be any different from the person who buys a charter package to Europe. We think that it is in the public interest to have it in a single agency. Uniformity and ease of understanding is important.

Mr. **Knodt**. I tend to agree wholeheartedly with Mr. Roberts. Again, it seems easiest as we go through deregulation and we look at these other issues, and if we have problems with those other issues, is it right for us to have to run to one entity for certain things and another entity for consumer protection issues and another entity for antitrust issues? Is it more proper that when problems occur, that we can go to one administrative agency or one agency who has expertise and a broad background in all of the subject matters of transportation and go to them for help or aid or to look at the problems.

Mr. **Mineta**. What would the customers think of the termination of smoking regulations? It strikes me that with smoking policies varying from airline to airline, as would happen if this regulation were left to the marketplace as proposed by the administration that travel agents are going to be called upon to explain smoking policies of airline A as opposed airline B to their customers. Is that something you think is distinctly a possibility?

Mr. **Knodt**. Yes, Mr. Chairman, it is a possibility that some airlines will live by the rules as they are today voluntarily. Other airlines may not. We see the example of Muse Air who doesn't allow any smoking on any of their planes. They feel that they can make economic gains by that. So maybe it would work.

Again, our thrust is: If it doesn't, who do we go to, and can't we have one distinct agency where we can focus our problems and we can speak and have them address those problems?

To speculate whether it would or wouldn't work, and a customer comes to me as an agent and I sit with him and he says I want a smoking seat, most of the time I can reserve it right in my computer by the seat number. It is known. So to a large extent we may not have problems. But I think only the future will tell, and I don't think our organization or, I won't speak for my counterparts, but I don't think our organization has a distinct opinion. It may work, and if it works, and we are not antideregulation, we tend to believe that if it works and the marketplace can sort it out, then so be it. But if it doesn't, and the same with our agency programs, if they don't and it starts to crumble, where do we go and what do we do?

If it is split between different agencies who all speak differently on every single issue that we focus on, where does that leave not only the traveling public but the agents? It wasn't only customers that ended up with a lot of lost money in the Braniff and Continental instances, but it was also a lot of agents who like yourself as a small businessman, you are the guy who sits across the desk from them and you are the guy that they look to, and those people came right back into my office and at my office we protected them. Other offices may not. I do have an agency relationship here and I can deny that I am responsible for Continental's bankruptcy, but you and I know that the good will of that customer who has been my customer for 10 years is what is at stake. And when he goes into my community and says well, that guy didn't protect me, that is why we are in all of these areas concerned.

Mr. **Mineta**. Let me followup on that. Do you believe then that with consumer protection at best uncertain after sunset of the CAB, air travelers with consumer complaints and problems are going to be looking more and more to the travel agents who sold them the transportation for resolution of their grievances?

Mr. **Knodt**. There is no doubt about it. There is no doubt. You are the frontline person in your business and I am the frontline person in my business and they are going to come right back to me and say why didn't I get that no-smoking seat or why didn't you tell me that particularly airline had financial troubles.

It is one of those situations that we are damned if we do and we are damned if we don't. If I plate away from the carrier, then I am hurting somebody and I am helping put that carrier out of business. If I don't plate away from him, the inevitable effect if it does go under is they are right back in front of me again.

I believe we can all live with it. As you go through which consumer protection rules are good or bad or whether we should leave it to the marketplace to determine it, there is a possibility, go ahead and maybe experiment with it. My customer doesn't know whether there is a rule or not, I do not believe. I don't know if he knows there is a government rule that says there must be a nonsmoking seat.

Mr. **Brown**. Mr. Chairman, if I may.

Mr. **Mineta**. Mr. Brown.

Mr. **Brown**. We agree largely with what ASTA has said and the effect here is that the buck stops with us as far as the consumer is concerned.

AAA's travel agency business as far as air transportation is concerned is made up of slightly over 90 percent personal travel as opposed to commercial travel—namely personal travel which is both discretionary and nondiscretionary.

The discretionary part of it probably makes up a good 70 to 75 percent of the personal travel.

At the moment I believe that the public, except in the area of protection of their dollars, has a great deal of confidence in our integrated air transport system, but as each of these elements, be it smoking or whatever it happens to be, breaks down farther and is left to carrier discretion, carriers that have varying levels of economic stability and strength, sizes of aircraft and all of the things that enter into their considerations, we are troubled to think that as this all shakes down, that 70 to 75 percent of discretionary travelers may lose confidence in the air transport system and then seek different types of vacations or different types of areas where they would spend their money. That is of great concern to us as well.

But just to repeat, we do agree with ASTA's feeling in the area that agents are having to face more and more of these kinds of things, and if we don't lead the consumer to the right decisions, they are going to come back to us and we are going to have a problem and then our ability to generate additional air traffic which will have a suppressing effect on fare increases is going to diminish as we move forward.

So we have a whole system that we are thinking about here and we respect and admire where you are coming from.

What you mentioned before about Arpage may turn out to be castor oil before it is all through.

Thank you.

Mr. MINETA. Mr. Roberts.

Mr. ROBERTS. Yes; we would agree. The problems will come back to the agents. Indeed, in many localities and in many States where the agent is deemed to be the agent of the consumer to have fiduciary responsibilities to the consumer and the agent is going to have responsibilities to inform the public and whenever possible to protect the public from many of these problems.

Surely, if there were no regulations governing smoking and different carriers had different policies, the agent would be expected to help the consumer sort it out.

I think also that another point that should be considered is in areas where consumer protection regulations may be needed. If there is no Federal regulation of an area, we can have State-by-State regulation and in the absence of uniform Federal regulations, if I am to take a flight from here to California with a stopover in Chicago or Denver, I don't know which State laws might govern.

It is very important I think to the traveling public that views aviation as kind of a national system that there be a uniform system and that when problems do arise where protection is needed that the consumer have the same protection regardless of the points between which he is traveling.

Mr. MINETA. Fine, thank you.

Mr. Lipinski, do you have any questions?

Mr. LIPINSKI. I have no questions, Mr. Chairman.

Mr. MINETA. Mr. Fleming, do you have some questions?

Mr. FLEMING. Thank you very much, Mr. Chairman.

Mr. Knodt, in your testimony on page 2 ASTA mentions the business review letter used by the Department of Justice to advise interested parties of its enforcement intentions in certain antitrust matters. What are some of the problems that you believe would still exist if, for example, the Justice Department informed the industry that it did not intend to take enforcement action against a particular industry agreement?

Mr. KNODT. With your permission, sir, I would like to give it to our special counsel who has more expertise in antitrust matters than I do.

Mr. FLEMING. Certainly.

Mr. RUDEN. I don't want to spend the whole afternoon of the committee's time answering that question. I will try to summarize a couple of the key problems that exist in that procedure.

In the first place, the Justice Department is not bound by any response they give on a business review letter.

Second, with business review letters, as a matter of policy, the Department of Justice tends to be very narrow with respect to the areas that they are in effect accepting or taking out of exposure to the antitrust laws.

ASTA itself has had an experience which is very illuminating in this area because it requested a business review letter from the Department of Justice with respect to a matter that was not subject to section 412 or 414 of the Federal Aviation Act and thus not capable of being immunized by the CAB. It was a joint venture, a fairly classical type of joint-venture arrangement among travel agents.

The Department of Justice, after approximately 6 months, which I think is problem No. 3, the time it takes to get one, responded by saying that the creation of the joint venture was not viewed by them as a serious antitrust event and therefore they had no intention of acting against the creation of the venture. But they expressed no opinion whatsoever on any conduct or actions that the joint venture might take, and as to the conduct and actions in the future, you were totally exposed to any decisions to attack it that the Justice Department might make.

So they in effect said that if you don't violate the law you have nothing to worry about, and the effect of the business review letter therefore was zero from our point of view. That is not an atypical experience with the business review letters.

So we don't regard the business review letter as even approximating a substitute for the administrative review and oversight that sections 412 and 414 provide.

Mr. **Fleming**. Just one more followup question, Mr. Ruden, ASTA indicated that the Justice Department would be very negative in any case in which antitrust immunity was likely to have meaningful effects in the market. However, Justice has already stated that such agreements would be granted immunity if the potential competitive disadvantages were outweighed by its social and economic benefits.

Could you explain the apparent contradiction between ASTA's testimony and the Department of Justice's position?

Mr. **Ruden**. Well, I don't think there is any contradiction. The Department of Justice's statement could be easily transported into one of those business review letters. It sounds like the one we got. It says if your agreement is good, in our opinion, we might approve it, and if it is not good, we won't. Well, that doesn't really tell you anything about their basic position with respect to the conferral of antitrust immunity.

What does tell you something is what they have said in writing and orally both before the CAB and committees of Congress, which is that, among other things, antitrust immunity is essentially inconsistent with deregulation. So that tells us that as long as deregulation is national policy, and we all expect it will continue to be, the Department of Justice will view the grant of antitrust immunity as a thing of such an exceptional nature as to almost never give it out.

So I really don't think there is any inconsistency there. They did suggest in a document which the Department of Transportation circulated as part of its sunset plan that there might be occasions when they would grant antitrust immunity. Those were cases in which the agreement, even though approved by the Government, might be subjected to private, antitrust attacks of a vexatious nature. That is flatly inconsistent with statements that they have made before the CAB and before Congress where they have stated, I believe I am recalling it correctly, that the problem of vexatious litigation is not unique to this industry and it is no justification for granting antitrust immunity.

So all the inconsistencies are internal to the Department of Justice's position which they have changed three, four or perhaps five times now with respect to the agency programs. Beyond that I can't explain their position. It changes too many times. That is one reason, frankly, that we don't regard the Department of Justice as a proper repository for sections 412 and 414 jurisdiction. They are an antitrust enforcement entity, and they do a respectable job of it most of the time, though they themselves change their view of what is appropriate policy in that area from time to time. We would like to see this in the hands of a department that has policy jurisdiction and policy interests.

We would therefore have to fundamentally disagree with Mr. Lazarus who says this industry is just like any other. It is not, and we think its history clearly establishes that.

Mr. FLEMING. Thank you for your responses, Mr. Ruden.

I have nothing further, Mr. Chairman.

Mr. MINETA. Thank you very much.

Now I call on Mr. Arthur Bass, chairman and chief executive officer of Midway Airlines. Mr. Bass, I want to thank you for your patience and forebearance.

The full text of your prepared statement will appear in the record at this point.

[Statement referred to follows:]

STATEMENT OF ARTHUR C. BASS, CHAIRMAN AND CHIEF EXECUTIVE OFFICER OF MIDWAY AIRLINES, INC.

Chairman Mineta and Members of the Committee: I am Arthur C. Bass, Chairman and Chief Executive Officer of Midway Airlines, Inc. To some of you, I am a familiar face. I first voiced support for aviation deregulation before the Congress in your hearings on domestic air cargo deregulation during the mid-1970's. At that time I was president of Federal Express and, as you will remember, a strong proponent of eliminating government regulation of the domestic air freight industry. In 1982 I joined Midway. I have, therefore, enjoyed the unique experience of guiding both a cargo and a passenger carrier through the problems of adjusting to a newly deregulated business environment.

My experiences with both carriers have strengthened my conviction that deregulation produces broad-scale public benefits unattainable under any form of government control yet devised.

I can assure you that the public will receive these benefits only if we can insure the existence of a free, competitive marketplace. During the period of transition from regulation to the marketplace we cannot allow the competitive environment to deteriorate. If we do, we will inevitably face the prospect of reregulation, either in the form of increased governmental intervention or the more insidious market discipline of a very few dominant carriers. It is for this reason I urge Congress to examine carefully the implications of the CAB's forthcoming sunset and to take positive steps to insure that this industry's transition to a freely competitive business environment continues.

I endorse limited, carefully drawn legislation which will amend the Deregulation Act so as to assign the task of continued oversight of the transition process to one agency of government—the Department of Transportation. Specifically, I am strongly urging assignment of the CAB's Section 411 functions to the DOT as well as the

CAB's Section 412 and 414 powers. Under the existing law, Sections 412 and 414 are scheduled for transfer to the Department of Justice.

Midway is one of several carriers that have carved out a discrete service and/or price segment of the market in which they can compete very effectively under deregulation. These new carriers are serving as "honest brokers," disciplining the larger, established carriers to improve their product and lower their prices. The presence of the new entrants is absolutely essential to a well functioning market. But, there should be no mistake about the fact that in an industry such as this one, which is in a transition after 40 years of intensive government control, the competitive environment is very fragile. It is, therefore, insufficient for the Congress to rely on governmental "benign neglect" to ensure the maintenance and enhancement of competition. Our experience over the past five years demonstrates this to be the case.

As regulation recedes, serious competitive obstacles have surfaced; obstacles which have arisen because this industry remains severely concentrated in terms of the financial resources and market identities of the established airlines. The computer reservation issue, of which you are familiar, is one of the more striking examples. There, in exercise of its Section 411 powers, the CAB is well on the way toward providing what we hope to be an effective pro-competitive remedy. Indeed, only last week, the CAB saw fit to issue an emergency rule to prevent CRS abuses that would have substantially impaired the operations of the longstanding Allegheny commuter system. The Board's work must not be lost by an "inadvertent" demise of Section 411.

We can expect other obstacles to emerge as we proceed through the transition from regulation. It is, therefore, essential that there remains one agency, with sufficient knowledge and expertise in air transportation matters, to respond promptly to new anti-competitive developments as they arise and threaten the competitive environment on which the success of your policies relies.

I must emphasize that the transition from government regulation to a deregulated environment is a process which will take several years to complete. This process will manifest itself in different phases. The initial period or deregulation, from which we are just now emerging, can be called the "irrational market" phase. During this period, large, established carriers believed themselves to be threatened by the present of new-entrant competitors. They were also jockeying for position among themselves, and, in sum, trying to be "all things to all people." These carriers expanded their market coverage in order to encompass segments served by the new competitors, while still laboring under cost structures that would not support the expansion. As we all know, these tactics have been injurious to most carriers and fatal to some.

We seem finally to be entering a second phase of the transition in which most carriers are taking greater care in the delineation of their product lines. The established carriers are reducing their costs and positioning themselves for future profitability in their market segments. These actions are evident in the success certain carriers have had in lowering their labor costs and obtaining large productivity increases through improved work rules and the realignment of their systems to take advantage of the synergies of hub and spoke operations. I see these actions as extremely promising developments and persuasive evidence that the full benefits of deregulation can be achieved and will soon be apparent.

There is however, one cloud on the horizon. Our progress toward the full benefits of deregulation may be impeded by certain major carriers which have a 40-year headstart during which they established their market positions. Consequently, the smaller carriers, and in particular the new and more innovative carriers, are extremely dependent upon a variety of business relationships with larger airlines. I am sure other witnesses have elaborated on these issues which include access to the retail travel market through the computer reservations systems, access to needed airport facilities, and interline agreements on ticketing and baggage transfers. Suffice it to say, that the larger carriers' power in these areas can be wielded with immediate and devasting consequences. Our experience over the past several years has shown these dangers to be more than hypothetical.

The pending sunset of the CAB will leave these pressing issues unaddressed unless Congress acts. A transfer of the Board's Section 411 authority to the DOT is essential if the smaller carriers, with valid complaints of unfair competitive practices, are to have a place to turn for effective and timely relief.

Under the current sunset provisions of the Deregulation Act, domestic Section 411 functions do not transfer to any agency. We have analyzed the DOT's arguments which suggest that the CAB Section 411 functions may transfer to the Federal Trade Commission. We have serious doubts about this, and I can tell you that the one thing this industry does not need is protracted litigation in the courts for the purpose of determining what in fact the Congress intended.

Moreover, there is little comfort to think that the Federal Trade Commission can be expected to exercise Section 411 responsibilities effectively. That agency has neither the requisite expertise nor familiarity with airline matters. If is not difficult to imagine a carrier being severely harmed or even pressed into bankruptcy by an unfair competitive practice long before the FTC staff would even understand that a problem exists. Moreover, it is not at all clear whether the FTC has the requisite policy mandate to act effectively.

It seems obvious and important that, at least during this transition period, carriers must have the ability to lodge a Section 411-type complaint before a body with an ongoing understanding of the issues, the ability to react quickly and a clear congressional mandate to do so. Only the Department of Transportation fills this role. It is now charged with developing overall aviation policy and authorized to compel production of the industry data and reports it requires in order to ensure the furtherance of congressional aviation policy. DOT is, therefore, uniquely capable of expeditiously investigating, analyzing and, if necessary, correcting abuses threatening the competitive environment which is essential for the success of deregulation.

There is another reason for consolidating in the DOT Section 411 functions, along with the CAB's existing authority under Sections 412 and 414 of the Act. Few in this industry and for that matter in the Congress have enough facts on the ultimate course of deregulation in order to conclude that no further oversight is necessary. That being the case, it seems that the important aviation oversight function should be vested in one agency as a matter of logic and administrative efficiency. Also, that agency should be under the direct scrutiny of this committee which understands the aviation industry and the unique forces now at play in it.

To date, your deregulation policies have have a success and their benefits are tangible and significant. If the industry is to build on that success, one regulatory safety valve remains critical—the ability to turn to an expert body for immediate relief from anticompetitive activities. Over the long term, we require an environment in which carriers are given a fair opportunity to market their services. This is the only effective protection we all have against the potential need for reversing the deregulation process and moving once again toward substantial government intervention. This we all want to avoid.

In conclusion, let me say that this committee is on the right track. Legislation along the lines indicated above is clearly needed, and in my judgment, inaction would not only be imprudent, it would place at risk all we have achieved since 1978.

Mr. Mineta. Please proceed.

TESTIMONY OF ARTHUR C. BASS, CHAIRMAN AND CHIEF EXECUTIVE OFFICER OF MIDWAY AIRLINES, ACCOMPANIED BY DAVID B. ARMSTRONG, VICE PRESIDENT, LEGAL AFFAIRS, MIDWAY AIRLINES, INC.

Mr. Bass. Thank you, Mr. Chairman, Mr. Lipinski, and all of those who have put up with a long day.

I will try to make this very brief and open it up to questions.

You have my prepared statement. I am Arthur Bass, chairman and chief executive officer of Midway Airlines.

With me is David Armstrong, who is our vice president of legal affairs.

I have the dubious distinction of having been on both cargo deregulation, having been the president of Federal Express during that period of time, and am now involved on the passenger side of deregulation.

My experience with both carriers simply strengthens my belief that deregulation is the only course of action that is viable for this industry. I think that it is safe to say that without deregulation Federal Express or the other carriers that came in under Federal Express would not be alive and well today, and it is hard to envision this society without that system working.

I think that the traveling public has to receive these benefits, and will only if we can insure the existence of a free marketplace and a free competitive environment in that marketplace.

I am not the brightest man in the world, but when I look at the array of people who are arguing for dispersement and diffusion of the elements that would allow us to have a funnel to redress wrongs in this industry, I cannot but wonder what it is that this industry is heading for if we allow three major carriers to have their way at this critical juncture in deregulation.

When I say this critical juncture, I have to urge everyone to look at the fact that we do not have a finite deregulation/regulation line anywhere. What we have had is an industry in transition, an industry that is still in transition where things occur and things appear differently than we had envisioned them when deregulation was first put on the block.

What we endorse today is limited, carefully drawn legislation which will amend the Deregulation Act so as to assign the task of continued oversight of the transition process, the transition process, I have to repeat that, to one agency of Government, the Department of Transportation.

In that we have to recognize that oversight that resides in the agency also consolidates congressional oversight in one knowledgeable committee, right here.

In order to carry this through to understanding relative to how I view the transition, I would like to just spend a few minutes taking everybody through what happened before regulation and after regulation.

We have positioned Midway to be somewhat out of the firing line under deregulation, but under regulation what you had was if this is services on this axis and this is price here and this is a high degree of services to low and this is a low degree of services to high, under regulation you have a broad range of services within a very narrow price-constrained area.

For many other industries in that curve, for example, investment banking, you had low-cost investment bankers, or whatever, down in this box. This was American Airlines and this was Midway and a variety of other carriers. When deregulation occurred all of the structures, and there was high cost relative to labor rates, to negotiation for aircraft, to negotiation for facilities was borne by the structure and passed through to the individual traveler via the cost of a ticket.

When deregulation came about and Midway is without all of that cost structure, instead of acting rationally, we went through an irrational phase where the major carriers or the established carriers came all the way out to offer lower service, yet higher than the deregulated new entries, yet carried with them a cost structure that made losses in that industry astronomical, a $600 million loss, and doing that with some 86 percent at discount in this industry.

The only point that I want to raise here is that you are now entering a phase where you see some rationality. Pricing is now not really coming down for a number of carriers in this area. Peoples Express, for example, found a niche down here where no one could respond other than the new, low-cost carriers.

Midway has positioned itself somewhere up here. We become, in essence, the honest brokers for an industry that is now starting to look at positioning itself well and not going into the vagaries of price wars and not going into a lot of the things that were harmful to the industry.

In fact, American, in what it has just accomplished in reducing its labor rates for 1988 and getting equipment for 1988 with low, direct, operating costs, is truly acting in the best interests of what deregulation was supposed to be all about.

If the cost reductions do not transfer down to the traveling public because there are no honest brokers around in the future, what we will see will be those profits inuring to the benefit of the carriers and most likely some form of reregulation because the oligopoly will not work.

Assuming that it does come back, there is a cloud on the horizon, and I think that we have to address that cloud on the horizon because this industry is not what I heard today, it is not like every other industry. It is an anomaly. Smaller carriers and, in particular, the new and more innovative carriers are extremely dependent upon a variety of business relationships with larger airlines. That is unlike any other industry.

Mr. MINETA. Mr. Bass, we have a call of the House right now for a recorded vote on the Bliley amendment. So we will recess at this point, and we will reconvene following that vote. That will be about 10 or 15 minutes.

[Recess.]

Mr. MINETA. The subcommittee will please come to order. Mr. Bass, you may continue.

Mr. BASS. Let me just go back to say what I endorse, and that is, carefully drawn legislation which will amend the Deregulation Act so as to assign the task of continued oversight of the transition process to one agency of Government, the Department of Transportation.

Specifically, I am strongly urging assignment of the CAB section 411 functions to the DOT as well as the CAB sections 412 and 414 powers.

Under the existing law, sections 412 and 414 are scheduled for transfer to the Justice Department. Again, I have to reiterate that the smaller carriers, and in particular the newer and more innovative carriers of which Midway is one, are extremely dependent upon a variety of business relationships with larger airlines.

The major carriers have the ability to manipulate those dependencies in an anticompetitive environment for which we need oversight. In other words, the carriers that want diffusion don't want any constraint on their ability to control these dependency factors. And it is toward that end that we feel that the consolidation in the DOT, along with 411 functions and along with the CAB's existing authority is essential.

Few in this industry, and for that matter in the Congress, have enough facts on the ultimate course of deregulation in order to conclude with confidence that no further oversight is necessary.

That being the case, it seems that the important aviation oversight function should be vested in one agency as a matter of logic and administrative efficiency.

Also, that agency should be under the direct scrutiny of this committee which understands the aviation industry and the unique forces now at play in it.

Thank you, sir, and I would welcome any questions you may have.

Mr. MINETA. Thank you very much for a very succinct and fine statement covering the points that we have been very interested in.

As I understand it, your position on the need for continuation of the section 411 prohibition against unfair competitive practices does not contemplate that domestic aviation will be reregulated or treated differently from other industries. Rather, you are requesting only that there continue to be a ban on the type of unfair competitive practices which are prohibited in all industry by the antitrust laws and the Federal Trade Commission Act.

Have I characterized your position correctly?

Mr. BASS. In essence, yes, recognizing that during this fragile transition, speed in redressing or addressing those problems is essential.

Mr. MINETA. I fully agree with your suggestion that we need to clarify with legislation that section 411 will continue. If we do pass legislation, I understand that you would prefer to have section 411 administered by the Department of Transportation rather than FTC. Could you elaborate on the reasons for your preference?

Mr. BASS. Very definitely. I think that the FTC, first of all, does not have the mandate, or its mandate is unclear relative to how it can perform and how it could perform quickly to address a problem in an industry where the repository of knowledge is already established in the DOT.

We are simply concerned, not so much with the quality of the FTC's capabilities, as much as with their ability to come up to speed rapidly in addressing things that really would be a problem. Somebody said it is like going and having an autopsy on somebody with a black lung disease as opposed to finding out whether the person had the black lung disease for openers.

Mr. MINETA. Your recommendations are that the Department of Transportation should get section 411 and 412 authority. This means that most of what CAB does will be transferred to DOT. In its testimony DOT argued that this would be inappropriate because it would not be a real sunset of the CAB and because having all aviation responsibilities in one agency would create temptations for reregulation.

Do you think that DOT's concerns are valid?

Mr. BASS. No; I don't. I think that reregulation would be an anathema, especially to me, and I would not be advising that course at all. What I see, however, is that during this transition an understanding that there are significant problems where the repository of knowledge, where the repository of the ability to get reports and elicit reports from all elements of this industry already resides in DOT and that a logical extension of that would be to the DOT's ability to redress wrongs that occur.

Mr. MINETA. And what are your reasons for taking the position that sections 412 and 414 should be administered by DOT instead of the Department of Justice?

Mr. BASS. Let me have Mr. Armstrong address that for a moment.

Mr. ARMSTRONG. The reasons are about the same. Basically that involves intercarrier relationships and it runs to the antitrust-immunity question. This industry, as Mr. Bass has said, is in transition. It is structured and was put together by over 40 years of tight regulation.

The problem we have is that there is no fine or bright line between regulation and deregulation. Again, it is the DOT that has the expertise and it is the transportation factors that go into decisions about antitrust immunities, and it is finally the administrative efficiency question of having all of these things in one place at this point in time.

This isn't to say that down the road this committee might decide to go at it differently. But the transition now is a fragile one and we are not through with it yet.

Mr. BASS. We do look at wanting a fair competitive environment. We don't want any advantage. We look at the problems that have already cropped up including airport access, computer reservations, and the interline problem that is still just starting to rear its head.

There are a number of other items that we haven't even envisage yet relative to what problems will exist in this industry over this next several years. We are saying that given the honest broker role that I think we do fulfill, the industry will come to really benefit the public and give deregulation the opportunity it deserves.

Mr. MINETA. Mr. Lipinski.

Mr. LIPINSKI. Thank you, Mr. Chairman.

It is a pleasure to have Mr. Bass and Mr. Armstrong here today. They are affiliated with my favorite airline that my wife, Rosemarie, and I fly twice every week. Midway Airlines is also located at Midway Airport in the city of Chicago which happens to be 5 minutes walking distance from my home. So I am very much interested in the development of Midway Airlines and Midway Airport and the entire southwest side of the city of Chicago.

So, I welcome the gentlemen here this afternoon. I appreciate your testimony.

I have a few questions that I would like to ask you.

First of all, last year due, to a severe slot location in effect in the Chicago region, Midway was forced to pull out of several cities, including Boston, Columbus, and Omaha. I know that you were offering some very competitive fares on these routes.

What happened to the fare structure after Midway Airlines pulled out? Did they go up, did they go down, or did they stay the same?

Mr. BASS. What happened in Boston was before my watch actually, but what happened there is instructive. When Midway Airlines came up with a very interesting promotional program that gave it leverage in the market against a major competitor, that major competitor pulled Midway Airlines off its computer reservation system and canceled interline agreements arbitrarily.

Load factors went down dramatically forcing Midway to pull out of that market. Upon its pulling out of that market, the discount fares on that route alone went up $100 one way when Midway withdrew from that market.

In terms of Columbus, Ohio, which was a slot constrained issue, when Midway was forced out of that market because it had no ability to reallocate its resources, the discount prices, in fact all prices went up in that market by 100 percent right after Midway withdrew from that market.

This is a disservice to the traveling public. While we are not creating an environment that allows us to say we are goodie two shoes, we are saying that there are certain obvious wrongs that unless there is some single repository for us to go to, to address these wrongs, this industry will not really see the full benefits of deregulation.

Mr. **Lipinski**. Are there any pending situations of that nature that you would care to go into or make mention to us at the present time, or if you might be having any kind of problems getting into any particular areas because of various situations that have developed?

Mr. **Bass**. I think that we have two right now which for a small airline are very intriguing. One deals with airport access where Midway has to pay 359 percent more for space that other major carriers get or that much less for similar oprations. In other words, it cost Midway $400,000 more to do business at an airport than it does an airline having a long-term lease on property.

David, do you want to expand on that?

Mr. **Armstrong**. Those are about the facts. This matter is still in negotiation. So we won't name names. But, basically it is a situation where new carriers, new entrants generally move into an airport. Facilities are scarce and over time you work yourself to a position where you can get a reasonably exclusive use of a gate.

In this one instance, though, we have the reasonably exclusive use of a gate, but the rates charged are on a per-turn basis. You take the same square footage of space that is allowed to us and go over and apply the rates available under long-term leases and the per annum cost to Midway is around $585,000. Were we able to lease or have equivalent rates that are available to the long-term lessees, the per annum rate would be $163,000.

So facility access is an area which is still unclear. I know there has been a task force on it. It is not physical access or entry all the time. That can be worked out, but there is a definite economic impact of being a small guy trying to get in and then go head to head with an established carrier at economically disadvantageous terms. That is one instance.

Another common example is the so-called signatory surcharge where you are presented with a catch-22 situation. You sign up on a long-term lease, assuming one is available, but you don't have any exclusive space. However, as to the nonexclusive charges, you are stuck for 20 years. If you don't choose to do that, or want a short-term cancellation provision, then you are a nonsignatory and every other fee you pay at the airport is anywhere from 20 to 50 percent higher. At one airport served by Midway, out of $60,000 in landing fees, our nonsignatory status threw another $35,000 into the cost pot on a per annum basis. That is the kind of thing that is arising from the airport access problem.

Mr. **Lipinski.** Are there other new, smaller carriers, such as yourself, that you know of, that have been running into similar problems in this area?

Mr. **Bass.** I think if you even just take a look at the brief histories of Altair that went bankrupt, Pacific Express that went bankrupt, and Executive that went bankrupt, a lot of things occur that cannot be pinpointed directly to any particular single aspect of unfair practices.

However, in aggregate, their costs are raised to a point where it becomes very ineffective for them to try to compete against majors who use their computer reservation systems in a biased way or who use airport access in a way that you either have to feed them or you can't exist.

And, further, if interline arrangements become a factor where for want of names, where American, United, and Delta would only be interlining among themselves and with entities that feed them, you will see a number of carriers that will be economically harmed to the point that they would go out of business.

Mr. **Lipinski.** You mentioned the computer reservation system and I understand that the CAB is scheduled to set out its recommendations on the control of this. Do you think that they are going to be able to resolve this problem successfully based upon anything that you may have heard officially or unofficially?

Mr. **Bass.** Well, I will let David address what they have just done, but in my view, and this goes back to the free market environment. My view is that the best you can hope for is to neutralize a computer reservations bias and then it becomes a free market positioning whether or not you have the product, you have the imagination, you have the capability and you have the guts, whatever, it takes, to position yourself in a free market environment.

When your source or your channel of distribution is limited through computer reservations systems that are biased in favor of your competitors, you do not have the ability to compete in a free market environment.

Mr. **Armstrong.** I don't know if I have anything more to add to that, except to point out that as far as we know, there is a CAB rule coming out. Based on what we know from the CAB's sunshine meeting, that rule will meet the reasonable needs of the smaller carriers, vis-a-vis CRS.

Mr. **Bass.** But the important point of that was that that was a situation where something was happening that needed immediate redress. The CAB at that point through the DOT acted promptly, created a change that was necessary and essential to preserve that free market environment.

Hadn't the CAB been there, or if someone had to go through the DOJ or the FTC or a myriad of other agencies to submit reports and file briefs, by the time you were done you would be doing an autopsy on that situation.

Mr. **Lipinski.** I imagine that would be your feelings in regard to the Justice Department handling any problems that you might have in securing gates or long-term contracts, leases, or anything like that.

Mr. **Bass.** For the interim period while this thing is in transition, very definitely. Until, as Mr. Lazarus said, we are in effect or in fact just like every other industry, I think that it is a little premature to look to the DOT to solve our problems.

Mr. LIPINSKI. With your experience in the airline industry, do you have any timeframe in mind when you think that things may fully shake down in the airline industry and we may all be able to see where it is going?

Mr. BASS. Oh, I think so. I think one of the things we have tried to do, we did it at Federal Express and we are doing it at Midway, is you start from the year about 1990 and work backward to understand those things that can and will happen in the marketplace.

It was not inconceivable that American would do what it did, which I think is absolutely in tune with deregulation. What I said earlier about negotiating the labor properly, not as it did under regulation, negotiating and finding the best piece of equipment and not the most expensive one, or whatever it was, and then negotiating or finding a way to get the best direct operating costs for the future.

All that bodes well for this industry and other carriers are doing similar things in different ways to cut their costs for the future. I think that part of what we see as our opportunity for the future is the fact that we at Midway have carved out a niche that is identified with a particular market segment that carries us into the future along with the benefits of deregulation.

Down the road I very definitely see this industry treated as any other industry because I think that all of the natural elements will shake out into being able to allow sunset to really occur.

Mr. LIPINSKI. Mr. Armstrong and Mr. Bass, I thank you very much for your answering my questions. I sincerely appreciate it and I am sure the rest of the committee does also.

Mr. Chairman, thank you.

Mr. MINETA. Well, thank you very much, Mr. Lipinski, for your continuing interest in the work of the Aviation Subcommittee. Mr. Bass and Mr. Armstrong, thank you very much. We appreciate your statement and your help in understanding the real world results of what we are working on. So I want to thank you for your contribution to this subcommittee's work.

This concludes our hearings on deregulation and CAB sunset. I appreciate the extensive and thoughtful testimony which we have received and the patience of the witnesses in sitting through the long sessions.

At the opening of this last set of hearings I indicated my belief that legislation was needed in several critical areas, including the preservation of consumer protection authority and fitness certification and a change in the agency which will administer antitrust immunity.

Most of the witnesses supported this type of legislation, and I remain convinced that it is needed. So we will be preparing a bill for introduction in the next few weeks.

With that, the subcommittee stands adjourned.

[Whereupon, at 5:09 p.m., the subcommittee was adjourned.]

ADDITIONS TO THE RECORD

REMARKS TO

THE INTENATIONAL AVIATION CLUB

BY

CONGRESSMAN NORMAN Y. MINETA
CHAIRMAN, HOUSE AVIATION SUBCOMMITTEE

JANUARY 17, 1984

I'M PLEASED TO HAVE BEEN INVITED TO MEET WITH YOU TODAY. IT'S BEEN A LONG TIME SINCE I'VE SEEN THIS MANY PEOPLE IN ONE PLACE DOING ANYTHING EXCEPT HAVING A CHRISTMAS PARTY.

AND IF THE CHRISTMAS PARTY SEASON IS OVER, THE CONVENING OF CONGRESS CANNOT BE FAR BEHIND.

IN THE UPCOMING SESSION OF CONGRESS I EXPECT ACTIVE DEBATE ON A NUMBER OF AVIATION ISSUES, BUT NONE WILL BE MORE CENTRAL TO THE AVIATION SUBCOMMITTEE'S AGENDA IN THE NEXT FEW MONTHS THAN THE QUESTION OF THE SUNSET OF THE CIVIL AERONAUTICS BOARD AND THE VARIOUS LOOSE ENDS LEFT DANGLING AT THAT POINT IN EXISTING LAW.

WHAT IS AT ISSUE HERE IS NOT THE COMPARATIVELY MINOR QUESTION OF THE FATE OF THE CAB, BUT THE QUESTION OF EXACTLY WHAT THE ECONOMIC REGULATORY POLICY AND STRUCTURE WILL BE FOR AVIATION IN THIS COUNTRY FOR THE FORESEEABLE FUTURE. THE DOMESTIC AIRLINE INDUSTRY HAS BEEN THROUGH AND IS STILL IN THE FINAL STAGES OF A MONUMENTAL TRANSITION FROM EXTENSIVE ECONOMIC REGULATION TO VIRTUAL ECONOMIC DEREGULATION. IT IS A TRANSITION PROCESS WHICH BEGAN RATHER CAUTIOUSLY IN THE MID-1970'S WITH CAB CHAIRMAN ROBSON, DRAMATICALLY ACCELERATED WITH FRED KAHN, WAS CODIFIED AND PUT ON A STATUTORY SCHEDULE BY THE AIRLINE DEREGULATION ACT OF 1978, AND 11-1/2 MONTHS FROM NOW WILL REACH ITS APPOINTED CONCLUSION -- OR AS CLOSE TO A CONCLUSION AS ANY PUBLIC POLICY QUESTION EVER GETS.

WE HAVE THOSE NEXT FEW MONTHS TO DECIDE WHETHER ANY CHANGES, FINE TUNING, OR IMPROVEMENTS CAN BE MADE IN THAT CONCLUSION WE WILL BE LIVING WITH FOR THE FORESEEABLE FUTURE. IT SHOULD HAVE BEEN CLEAR ALL ALONG -- AND I THINK IS CLEAR TO ALL NOW THAT THE GENERAL RECOVERY IS UNDERWAY AND YIELDS ARE FIRMING UP -- THAT THERE IS NOT GOING TO BE ANY FUNDAMENTAL REVERSAL OF THE DEREGULATION PROCESS. WE ARE NOT GOING BACK. THE BENEFITS TO THE CONSUMER, THE ABILITY OF THE INDUSTRY TO RESPOND RAPIDLY TO CONSUMER PREFERENCES AND TO EXTERNAL SHOCKS, SUCH AS ENORMOUS CHANGES IN FUEL PRICES, HAVE BEEN TOO CLEARLY TO THE ADVANTAGE OF TOO MANY PEOPLE FOR THERE TO BE ANY FUNDAMENTAL REVERSALS. BUT THE QUESTION REMAINS AS TO WHETHER, WITH MORE THAN FIVE YEARS OF EXPERIENCE BEHIND US SINCE PASSAGE OF THE DEREGULATION ACT, WE CANNOT IMPROVE IN ANY WAY ON OUR 1978 PRESCRIPTION FOR EXACTLY WHERE THIS DEREGULATORY TRANSITION PROCESS SHOULD CONCLUDE.

THIS QUESTION HAS JUST BEEN BROUGHT TO A HEAD BY THE FACT THAT THE DEPARTMENT OF TRANSPORTATION AND THE REAGAN ADMINISTRATION HAVE RECENTLY CONCLUDED THAT THERE SHOULD BE NO SUNSET LEGISLATION AND THAT THE 1978 ACT IS SUFFICIENT TO DETERMINE WHAT KIND OF REGULATORY SCHEME WE SHOULD BE LIVING UNDER IN THE COMING YEARS.

When the Department was first considering this approach, I raised a number of concerns: areas where I thought the 1978 Act alone might leave us with an unsatisfactory regulatory scheme for the airline industry in 1985 and beyond. I was told that the Department would be developing a legal analysis which they hoped would show that these undesirable effects would not occur. I have yet to see any analysis I would describe as either comprehensive or convincing.

Let me lay out for you today several of my key concerns regarding the Administration's no-bill option and give you my thoughts as to what we in the House are likely to be doing on these issues, to the extent I can predict that.

First, I am concerned about consumer protection. Although the Deregulation Act of 1978 opened domestic airline routes and rates to free competition, the Act did not take away CAB's powers to protect consumers during the six-year transition to deregulation. Under deregulation there have been a proliferation of fares and types of services offered. This has generally been to the consumer's benefit, although the range of options and the speed with which they can change can sometimes impose burdens of their own on consumers. Through all

THESE CHANGES, CONSUMERS HAVE ENJOYED CERTAIN KEY AREAS OF FIRM GROUND PROVIDED BY CAB'S CONSUMER PROTECTION REGULATIONS. LEADING EXAMPLES ARE REGULATIONS GOVERNING OVERBOOKING AND DENIED BOARDING COMPENSATION, SMOKING, LOST BAGGAGE LIABILITY, NOTIFICATION TO PASSENGERS OF TERMS OF THE CONTRACT OF CARRIAGE, AND PROTECTION OF CHARTER PASSENGERS. THESE REGULATIONS HAVE GIVEN THE CONSUMER KEY AREAS IN WHICH HE OR SHE CAN ASSUME THAT AT LEAST THE REQUIRED MINIMUM WILL BE PROVIDED BY ANY CARRIER.

IF NO FURTHER LEGISLATION IS ENACTED THE FATE OF CONSUMER PROTECTION AFTER CAB SUNSETS IS TROUBLINGLY UNCERTAIN AT BEST. AND THERE IS A GOOD CHANCE THAT WITH NO FURTHER LEGISLATION ENACTED BY THIS CONGRESS, COME NEXT JANUARY AIRLINE PASSENGERS WILL ABRUPTLY FIND THEMSELVES IN A BRAVE NEW WORLD WHERE THERE ARE NO CONSUMER PROTECTION REGULATIONS WHATSOEVER.

THE 1978 ACT FAILS TO TRANSFER TO OTHER AGENCIES AFTER CAB SUNSETS THE STATUTORY PROVISIONS UNDER WHICH CAB HAS PROTECTED CONSUMERS. DOT APPARENTLY BELIEVES THAT SOME OF THE CAB'S CURRENT AUTHORITY, SPECIFICALLY THE BOARD'S AUTHORITY UNDER SECTION 411 TO PROTECT CONSUMERS AGAINST UNFAIR AND DECEPTIVE PRACTICES, COULD BE REPLACED BY SIMILAR AUTHORITY AT THE FEDERAL TRADE COMMISSION AFTER SUNSET. THEIR ARGUEMENT, HOWEVER, SUFFERS FROM THREE MAJOR WEAKNESSES:

-FIRST, EVEN IF COMPLETELY VALID, IT WOULD DO NOTHING TO PRESERVE THE OTHER HALF OF THE CAB'S CONSUMER PROTECTION AUTHORITY, WHICH IS SECTION 404 OF THE ACT, THE AUTHORITY TO PROTECT CONSUMERS BY ENSURING SAFE AND ADEQUATE SERVICE. SECTION 404 IS, FOR EXAMPLE, THE KEY STATUTORY BASIS FOR ALL CAB SMOKING REGULATION.

-SECOND, THE WHOLE IDEA THAT FTC COULD ASSUME A REGULATORY JURISDICTION OVER AIRLINES SIMILAR TO THE CAB'S SECTION 411 AUTHORITY IS NOT BASED ON EXISTING STATUTORY LANGUAGE AT ALL, BUT ON A RATHER THIN INTERPRETATION OF LEGISLATIVE INTENT. IF FTC EVER TRIED TO EXERCISE THAT AUTHORITY OVER AIRLINES, CONSUMERS WOULD BE LEFT QUITE JUSTIFIABLY UNCERTAIN AS TO WHETHER THE FTC'S EFFORTS COULD SURVIVE ANY CHALLENGE THAT MIGHT BE BROUGHT IN COURT.

-AND THIRD, EVEN IF THE FTC DID SUCCESSFULLY GET, BY INTERPRETATION, AUTHORITY OVER AIRLINES SIMILAR TO CAB'S SECTION 411 AUTHORITY, THERE IS A SUBSTANTIAL RISK THAT NONE OF CAB'S EXISTING CONSUMER PROTECTION REGULATIONS WOULD BE CONSTRUED TO TRANSFER TO FTC. THE PASSENGER COULD, THEREFORE, FIND HIMSELF OR HERSELF WITHOUT ANY CONSUMER PROTECTION REGULATIONS ON JANUARY 1. AND GIVEN THE SUBSTANTIAL PROCEDURAL HURDLES WHICH MUST PRECEED ANY FTC ACTION, IT MIGHT BE YEARS BEFORE CONSUMERS WOULD EVER SEE SUCH REGULATIONS FROM FTC, IF EVER.

WHAT ALL OF THIS WOULD MEAN TO THE CONSUMER IS THAT UNDER THE ADMINISTRATION'S NO-BILL PROPOSAL, THE BEST CASE IS THAT COME JANUARY, ALL SMOKING REGULATIONS WOULD DISAPPEAR AND OTHER CONSUMER PROTECTION REGULATIONS WOULD BE BASED ON DOUBTFUL STATUTORY AUTHORITY AND SUBJECT TO COURT CHALLENGE AND AN UNCERTAIN FUTURE. AND IF SOMETHING OTHER THAN THE BEST CASE OCCURS, THEN ALL CONSUMER PROTECTIONS COULD DISAPPEAR IMMEDIATELY ON JANUARY 1.

CONSUMER PROTECTION THAT UNCERTAIN IS NO PROTECTION FOR CONSUMERS AT ALL, AND I AM NOT WILLING TO LEAVE CONSUMERS TO SO UNCERTAIN A FATE. I BELIEVE THAT THE STATUTORY AUTHORITIES WHICH PROVIDE FOR CONSUMER PROTECTION SHOULD NOT BE DIMINISHED ONE IOTA FROM WHAT THEY ARE TODAY, AND THAT FOR THE CONVENIENCE OF CONSUMERS AND CARRIERS ALIKE, THESE AUTHORITIES SHOULD CONTINUE TO BE THE RESPONSIBILITY OF A SINGLE FEDERAL AGENCY. I FIND IT HARD TO BELIEVE THAT THE CONGRESS WILL SIT IDLY BY WHILE CONSUMER PROTECTION AUTHORITIES DISAPPEAR, WHILE SMOKING REGULATIONS DISAPPEAR, AND WHILE DENIED BOARDING COMPENSATION AND BAGGAGE LIABILITY REGULATIONS AND ALL THE REST FACE AT BEST AN UNCERTAIN FUTURE IF NOT OUTRIGHT DISAPPEARANCE. YET THIS IS WHAT THE ADMINISTRATION IS PROPOSING WHEN IT PROPOSES THAT THERE BE NO BILL.

I HOPE IT WILL BE CLEAR THAT MY POSITION IS NOT THAT ALL EXISTING CONSUMER PROTECTION REGULATIONS SHOULD BE FROZEN IN PLACE FOREVER. THESE REGULATIONS HAVE EVOLVED OVER TIME TO MEET CHANGING CIRCUMSTANCES AND NEW PROBLEMS, AND I AM CERTAIN THAT CONTINUING EVOLUTION WILL BE NEEDED IN THE FUTURE. AS DEREGULATION CONTINUES, WE MAY FIND THAT SOME PROBLEMS WHICH COULD NOT BE LEFT TO THE MARKETPLACE IN A REGULATED ENVIRONMENT CAN BE HANDLED SATISFACTORILY BY THE MARKET UNDER DEREGULATION. WHAT I AM SAYING IS THAT I AM NOT WILLING TO ALLOW THE UNDERLYING AUTHORITY TO BE STRIPPED FROM THE STATUTE, WHICH WOULD PREVENT ANY REGULATORY ACTION TO PROTECT CONSUMERS FROM WHATEVER PROBLEMS MIGHT EXIST IN THE FUTURE, INCLUDING THOSE WE CAN NOT YET IMAGINE. THE STATUTORY AUTHORITY OUGHT TO BE THERE TO AUTHORIZE THOSE CONSUMER PROTECTION REGULATIONS WHICH ARE TRULY NECESSARY AT ANY TIME.

SUCH A SITUATION IS NOW UNFOLDING, WITH CAB CURRENTLY CONSIDERING WHETHER NEW RULES ARE NECESSARY TO PROTECT CONSUMERS FROM NEW DEVELOPMENTS IN HOW THE AIRLINE MARKETPLACE PRESENTS ITSELF TO THE CONSUMER, SPECIFICALLY THROUGH THE COMPUTER DISPLAYS GENERALLY CONTROLLED BY A FEW OF THE AIRLINES. THIS ATTEMPT TO DEAL WITH THE SO-CALLED "COMPUTER BIAS" ISSUE IS BASED ON THE CAB'S AUTHORITY UNDER SECTION 411. THE BOARD EXPECTS TO CONCLUDE ITS RULEMAKING IN THE NEXT COUPLE OF MONTHS, BUT GIVEN THE UNCERTAIN FUTURE AS I'VE DESCRIBED HERE

TODAY FACING __ANY__ REGULATION BASED ON SECTION 411, AS IT IS UNCERTAIN THAT ANY RULE THE BOARD MIGHT CHOOSE TO ISSUE WOULD SURVIVE THE END OF THE YEAR. DEPENDING ON WHAT THAT RULE MIGHT LOOK LIKE, THAT SITUATION MIGHT MAKE SOME INTERESTS HAPPY. NEVERTHELESS, IF A RULE IS NECESSARY TO PROTECT CONSUMERS FROM MARKET DISTORTIONS IN COMPUTER RESERVATIONS SYSTEMS AND IF THE BOARD SO CONCLUDES, THEN ALL THE BOARD'S EFFORTS TO DATE MAY BE FOR NAUGHT AND THE CONSUMER MAY END UP UNPROTECTED IN YET ANOTHER AREA ON JANUARY 1.

ALTHOUGH SOME IN THE AIRLINE INDUSTRY INSTINCTIVELY DISLIKE ANY GOVERNMENT REGULATION, THEY SHOULD BEAR IN MIND THAT THE ALTERNATIVE TO CONSUMER REGULATION MAY BE EVEN LESS TO THEIR LIKING. IF THERE WERE NO UNIFORM FEDERAL REGULATION OF A CONSUMER ISSUE, SUCH AS MINIMUM LIABILITY LIMITS FOR LOST BAGGAGE, THE LEGISLATURES AND COURTS OF EACH STATE MIGHT BE FREE TO IMPOSE THEIR OWN RULES. THIS COULD SUBJECT BOTH AIRLINES AND THEIR PASSENGERS TO A CONFUSING SITUATION OF DIFFERENT RULES IN DIFFERENT STATES. FOR EXAMPLE, IT WAS TO AVOID THESE TYPES OF PROBLEMS THAT MANY AIRLINES SUPPORTED A RECENT CAB REGULATION PRESCRIBING UNIFORM FEDERAL STANDARDS FOR THE TYPE OF NOTICE WHICH MUST BE GIVEN TO AIRLINE PASSENGERS OF THE TERMS OF THE AIRLINE'S CONTRACT WITH THE PASSENGER.

IF THE AIRLINES STOP AND THINK ABOUT IT, I THINK THEY WILL CONCLUDE THAT MANY CONSUMER PROTECTION REGULATIONS BENEFIT AIRLINES AS WELL AS CONSUMERS.

I WOULD ALSO URGE THE AIRLINES TO BEAR IN MIND THAT CONSUMER PROTECTION BY THE CAB HAS NEVER COVERED MORE THAN A FEW LIMITED AREAS AND I SEE NO REASON TO ASSUME THAT THAT APPROACH WOULD EVER CHANGE. EVEN IN THE HEYDAY OF REGULATION, WHEN THE CAB REGULATED AIRLINE ROUTES AND RATES VERY CLOSELY, CAB DID NOT REGULATE MOST ELEMENTS OF AIRLINE SERVICE, SUCH AS THE NUMBER OF FLIGHTS PROVIDED AND WHETHER THE ON-BOARD SERVICE WAS TO BE SPARTAN OR LUXURIOUS. EVEN UNDER REGULATION MOST ELEMENTS OF SERVICE WERE LEFT TO THE DISCRETION OF MANAGMENT, SUBJECT TO COMPETITION. FOLLOWING CAB SUNSET I WOULD EXPECT A CONTINUATION OF THIS PHILOSOPHY. CONSUMER PROTECTION REGULATIONS WOULD BE IMPOSED ONLY IN THOSE LIMITED INSTANCES IN WHICH THE COMPETITIVE MARKETPLACE DOES NOT MEET CONSUMER NEEDS.

UNDER DEREGULATION WE HAVE ALSO HAD A CONSIDERABLE INFLUX OF NEW CARRIERS INTO THE BUSINESS. THIS HAS GENERALLY BEEN GOOD FOR COMPETITION AND THEREFORE GOOD FOR THE TRAVELING PUBLIC. YET WE HAVE OBVIOUSLY NOT MADE ENTRY TOTALLY OPEN: NOT JUST ANYBODY CAN SET UP A SIGN AND SAY THEY'RE AN AIRLINE. A NEW CARRIER HAS TO PROVE ITS BASIC OPERATING COMPETENCE TO FAA IN ORDER TO GET AN OPERATING CERTIFICATE AND IT HAS TO BE JUDGED ON ITS GENERAL MANAGERIAL AND FINANCIAL FITNESS AND ON ITS COMPLIANCE DISPOSITION BY THE CAB. HOWEVER, THE 1978 LAW DOES NOT TRANSFER THESE CAB AUTHORITIES FOR FITNESS DETERMINATIONS TO ANOTHER AGENCY AFTER SUNSET.

IT IS HARD TO ARGUE THAT CAB HAS BEEN OVERLY AGGRESSIVE IN USING ITS AUTHORITY IN RECENT YEARS, ALTHOUGH IT CERTAINLY HAS DENIED FITNESS DETERMINATIONS TO A NUMBER OF APPLICANTS. BUT THE QUESTION IS WHETHER WE SHOULD GIVE CAB'S STATUTORY AUTHORITY TO ANOTHER AGENCY OR WHETHER WE WANT A SITUATION WHERE IT IS POSSIBLE THAT NO FEDERAL AGENCY WOULD CONSIDER ITSELF AUTHORIZED TO JUDGE AN AIRLINE'S GENERAL MANAGERIAL AND FINANCIAL FITNESS AND COMPLIANCE DISPOSITION. I BELIEVE THAT THE RANGE OF AIRLINE FITNESS DETERMINATIONS WE HAVE TODAY SHOULD NOT BE REDUCED ONE IOTA.

IN BOTH THE CONSUMER PROTECTION AREA AND IN THE FITNESS AREA WE SHOULD REMIND OURSELVES THAT THIS IS AN INDUSTRY WHICH, EVEN MORE THAN MOST, IS BUILT ON CONSUMER CONFIDENCE. WHEN THE PASSENGER PAYS TODAY FOR TRANSPORTATION HE OR SHE HOPES TO RECEIVE IN THE FUTURE, WHEN HE OR SHE CHECKS THEIR BAGGAGE AND WATCHES EVERYTHING THEY NEED ON THEIR VACATION OR THEIR BUSINESS TRIP DISAPPEAR AROUND THE CORNER ON THAT CONVEYOR BELT, WHEN HE OR SHE STRAPS IN ELBOW-TO-ELBOW WITH SEVERAL HUNDRED STRANGERS ALL IN A SEALED TUBE AND IMPLICITLY SAYS -- TAKE ME TO 40,000 FEET AND PLEASE DON'T DROP ME -- THAT IS A LOT OF CONFIDENCE WE ASK FROM THE GENERAL PUBLIC. JUDGING BY THE GROWING NUMBER OF PEOPLE WHO FLY AT ONE TIME OR ANOTHER, AN AWFUL LOT OF THE GENERAL PUBLIC DOES HAVE THAT CONFIDENCE IN YOU AND THAT MEANS YOU'VE EARNED IT. BUT HOW MUCH MORE STRAIN DO WE WANT TO PUT ON THAT CONFIDENCE BY TAKING AWAY CONSUMER PROTECTIONS THAT NOW EXIST AND THAT CONSUMERS ARE ACCUSTOMED TO AND RELY ON? EVEN IF MOST CARRIERS WOULD NOT DIMINISH IN

ANY WAY WHAT THEY NOW OFFER THE PASSENGER, SHOULD THOSE CARRIERS BE SUBJECT TO INCREASED SUSPICION AND UNEASINESS WHEN PASSENGERS GET LESS FROM ONE PARTICULAR CARRIER THAN THE GENERALLY ACCEPTED INDUSTRY PRACTICE THEY EXPECTED? I QUESTION WHETHER IT WOULD BE IN A CARRIER'S INTEREST TO ADVOCATE LEGISLATIVE INACTION WHEN THAT COURSE WILL MEAN ADVOCATING ADDITIONAL UNCERTAINTY AND ANXIETY FOR THOSE THEY HOPE TO SERVE.

ANOTHER AREA OF CONCERN WITH THE "NO-BILL" APPROACH IS ANTITRUST IMMUNITY. THE CAB NOW HAS THE AUTHORITY TO IMMUNIZE INTERCARRIER AGREEMENTS FROM ANTITRUST LAWS. UNDER EXISTING LAW, AND THEREFORE UNDER THE ADMINISTRATION'S NO-BILL POSITION, THAT AUTHORITY WOULD TRANSFER TO THE DEPARTMENT OF JUSTICE. DOT IS NOW MAKING THE ARGUMENT THAT THE PEOPLE AT JUSTICE REALLY AREN'T SO BAD, THEY DON'T HAVE FANGS, THEY'RE HOUSEBROKEN, AND ONCE YOU GET TO KNOW THEM A LITTLE BETTER YOU'LL REALLY LIKE THEM. AND I HAVE TO ADMIT THAT I HAVE KNOWN A FEW EMPLOYEES OF THE JUSTICE DEPARTMENT OVER THE YEARS WHO WERE QUITE WELL-BEHAVED.

BUT I DON'T THINK THAT'S THE ISSUE HERE. THE POINT IS THAT THE STATUTORY TESTS THAT ARE APPLIED IN DETERMINING WHETHER ANTITRUST IMMUNITY SHOULD BE GRANTED ARE TESTS BASED ON TRANSPORTATION BENEFIT AND TRANSPORTATION POLICY. THE TESTS ARE, FIRST, WHETHER THE AGREEMENT WOULD PRODUCE IMPORTANT TRANSPORTATION BENEFITS FOR THE PUBLIC, AND SECOND, WHETHER THERE ARE ANY REASONABLE ALTERNATIVES WHICH ARE LESS

ANTICOMPETITIVE, BUT WOULD ACCOMPLISH THE SAME RESULTS. THE DEPARTMENT OF JUSTICE MAY BE WELL-SUITED TO JUDGE ANTITRUST ISSUES, BUT THEY HAVE, IN MY OPINION, *NO* SPECIAL ABILITY TO JUDGE THE TRANSPORTATION BENEFITS TO THE PUBLIC AND *NO* SPECIAL ABILITY TO JUDGE THE REAL-WORLD REASONABLENESS OF TRANSPORTATION ALTERNATIVES, THE TWO KEY TESTS THAT HAVE TO BE JUDGED IN MAKING ANY FINAL DECISION. I WANT THAT FINAL DECISION IN THE HANDS OF SOMEBODY WHOSE *FIRST* RESPONSIBILITY IS *TRANSPORTATION*, AND THAT CERTAINLY *SHOULD* BE THE DEPARTMENT OF TRANSPORTATION.

THE ADMINISTRATION, IN FURTHERANCE OF ITS NO-BILL POSITION, APPEARS TO NOW BE PROMISING THE INDUSTRY THAT ALL JUSTICE'S TEETH WILL BE REMOVED BEFORE THE AIRLINES ARE ASKED TO INSERT THEIR COLLECTIVE HEAD INTO THE LION'S MONTH. WE SEEM TO BE OPERATING IN THE PROMISE-THEM-ANYTHING-*AND*-GIVE-THEM-ARPEGE MODE. I WOULD SUGGEST TO YOU, HOWEVER, THAT THE HALF-LIFE OF THOSE PROMISES CANNOT BE GUARANTEED AND *MIGHT* BE VERY SHORT, AND THAT THE ANTI-TRUST AUTHORITY OVER THIS INDUSTRY, ONCE GIVEN TO JUSTICE, WILL REMAIN THERE *LONG* AFTER BOTH THE PROMISES AND THE ARPEGE HAVE WORN OFF.

ANOTHER SUBJECT WHICH WILL BE MUCH-DISCUSSED AS THE SUBCOMMITTEE CONSIDERS ITS APPROACH TO LEGISLATION IS INSULATION. THE 1978 ACT TRANSFERS IMPORTANT CAB FUNCTIONS TO DOT, SUCH AS THE REGULATION OF INTERNATIONAL AVIATION AND ESSENTIAL AIR SERVICE, BUT THE ACT DOES NOT SPECIFY HOW DOT SHOULD BE ORGANIZED TO ADMINISTER THESE RESPONSIBILITIES. IN CARRYING OUT THESE FUNCTIONS DOT WILL BE GRANTING VALUABLE RIGHTS WORTH MILLIONS OF DOLLARS AND RESOLVING ISSUES WHICH ARE CRITICAL TO THE DEVELOPMENT OF A SOUND AVIATION SYSTEM. HISTORICALLY IN OUR SYSTEM OF GOVERNMENT THIS TYPE OF DECISION HAS BEEN GIVEN TO AN INDEPENDENT AGENCY WHOSE MEMBERS HAVE TENURE AND ARE INDEPENDENT OF THE EXECUTIVE BRANCH. THE INDEPENDENT AGENCY IS REQUIRED TO FOLLOW QUASI-JUDICIAL PROCEDURES IN REACHING ITS DECISIONS. THESE REQUIREMENTS ARE DESIGNED TO ENSURE THAT APPLICANTS FOR A LICENSE WILL BE AFFORDED DUE PROCESS, THAT CASES WILL BE DECIDED SOLELY ON THE BASIS OF THE MERITS, AND THAT REGULATORY DECISIONS WILL NOT BECOME PART OF THE PROCESS OF DEVELOPING SUPPORT FOR AN ADMINISTRATION OR FOR ITS LEGISLATIVE PROGRAM.

AS MOST OF YOU KNOW, I AND OTHER MEMBERS OF THE COMMITTEE HAVE HAD A LONG-STANDING CONCERN WITH ENSURING THAT AVIATION DECISIONS DO NOT BECOME A POLITICAL FOOTBALL, AND IT WAS THESE CONCERNS THAT LED ME TO ASK THE DEPARTMENT OF TRANSPORTATION ABOUT A YEAR AGO TO TELL US HOW THEY WOULD ADMINISTER THEIR NEW RESPONSIBILITIES AFTER CAB SUNSET, AND HOW THEY WOULD ENSURE THAT THEIR DECISIONS WOULD BE INSULATED FROM POLITICAL CONSIDERATIONS. WE EXPECT TO GET THE DEPARTMENT'S DETAILED

PROPOSALS ON THESE ISSUES AT HEARINGS WE WILL BE HOLDING NEXT MONTH. AFTER REVIEWING THE DEPARTMENT'S PROPOSALS AND THE COMMENTS OF THE AVIATION COMMUNITY, WE WILL DECIDE WHETHER LEGISLATION IS NECESSARY TO ENSURE INSULATION OF THE DEPARTMENT'S NEW RESPONSIBILITIES.

I HAVE DRAWN NO CONCLUSIONS AT THIS POINT AS TO WHETHER THE DEPARTMENT'S PROPOSALS, TO THE EXTENT WE ARE AWARE OF THEM, ARE ADEQUATE. THUS FAR, I AM NOT SURE IN MY OWN MIND WHAT COMBINATION OF PROCEDURES AND ORGANIZATIONAL STRUCTURE WOULD CONSTITUTE ADEQUATE INSULATION. BUT I AM CONVINCED THAT THE QUESTION OF INSULATION IS AN IMPORTANT ONE. IT IS NOT THAT THE PRESENT SYSTEM PROVIDES ABSOLUTELY PERFECT INSULATION: IT DOES NOT, IT CAN NOT, AND MAYBE IT SHOULD NOT. EVEN AN INDEPENDENT AGENCY HAS TO LIVE WITH OMB TO GET ITS BUDGET REQUEST AND WITH CONGRESS TO GET ITS FUNDING. BUT THE QUESTION IS WHETHER WE SHOULD TOLERATE ANY SIGNIFICANT REDUCTION IN THE DEGREE OF INSULATION WE DO HAVE TODAY.

I HAVE LONG HEARD COMPLAINTS IN THIS INDUSTRY THAT IN INTERNATIONAL NEGOTIATIONS WE TOO OFTEN TRADE OFF THE BEST INTERESTS OF U.S. CARRIERS OR U.S. PASSENGERS AND SHIPPERS TO OBTAIN GOOD WILL ON NON-AVIATION ISSUES, AND THAT WE END UP WITH A WEAKER AIR TRANSPORT SYSTEM AS A RESULT. WITHOUT ADEQUATE INSULATION, WE WOULD BE EXTENDING THAT SITUATION TO DOMESTIC AVIATION POLICY-MAKING AS WELL. AN EAS DETERMATION MIGHT END UP BEING A PAWN TO AN ADMINISTRATION'S ATTEMPT TO SECURE VOTES FOR SOME MAJOR LEGISLATIVE INITIATIVE UNRELATED TO

AVIATION. AN INTERNATIONAL ROUTE AWARD MIGHT END UP BEING A PAWN TO THE COMMITTEE TO REELECT WHOMEVER. TO WHATEVER EXTENT WE ALLOW THAT TO HAPPEN, WE WILL PAY WITH LESS THAN THE BEST CHOICES BEING MADE AND WITH A WEAKER AVIATION SYSTEM AS A RESULT. I URGE THE INDUSTRY TO TAKE A SECOND LOOK AT THE INSULATION QUESTION OVER THE NEXT MONTH IN PREPARATION FOR OUR HEARINGS. WHATEVER WE DO OR DON'T DO IN THIS AREA, YOU WILL MOST PROBABLY BE LIVING WITH LONG AFTER ALL THE CURRENT OFFICE-HOLDERS HAVE DEPARTED.

FOR A NUMBER OF REASONS, BUT MOST IMPORTANTLY CONSUMER PROTECTION AND ANTI-TRUST IMMUNITY, IT IS MY INTENT TO INTRODUCE AND TO SEEK ENACTMENT OF LEGISLATION BEFORE THE CAB SUNSETS. IT IS POSSIBLE, I SUPPOSE, THAT THE ADMINISTRATION MIGHT YET SHOW ME HOW ALL MY CONCERNS CAN BE SATISFIED WITHOUT LEGISLATION. BUT GIVEN THE ANALYSIS WE HAVE DONE AT THE SUBCOMMITTEE, I FRANKLY DON'T SEE HOW THAT WOULD BE POSSIBLE.

IF THAT LEGISLATION, HOWEVER, WERE TO BECOME BURDENED DOWN WITH REREGULATORY OR OTHER SPECIAL INTEREST ADD-ONS, THEN I THINK NO BILL IS THE ONLY LIKELY OUTCOME. IT IS, OF COURSE, ENTIRELY POSSIBLE THAT WITH SUFFICIENT ADD-ONS, THE BILL COULD ACTUALLY BECOME WORSE THAN NO BILL. GIVEN THE RELATIVELY SHORT TIME REMAINING IN THIS CONGRESS, AND GIVEN THE FACT THAT THE ADMINISTRATION HAS NOTHING IT WANTS FROM THIS LEGISLATION AND THEREFORE NO NEED TO SIGN IT IF IT CONTAINS SUBSTANTIALLY OBJECTIONABLE PROVISIONS, SUCH ADD-ONS WOULD CLEARLY BE POINTLESS AND SELF-DEFEATING.

I HAVE TWO FURTHER CONCERNS WHICH ARE PART-AND-PARCEL OF THE CAB SUNSET QUESTION AND WHICH I SHOULD MENTION TO YOU TODAY.

THE FIRST IS THE LEVEL OF STAFFING DOT INTENDS TO DEVOTE TO THE AVIATION FUNCTIONS IT INHERITS FROM CAB. WE CONSIDER THESE REMAINING AVIATION FUNCTIONS TO BE VERY IMPORTANT FOR PASSENGERS, SHIPPERS, AND AIRLINES, AND WE EXPECT DOT TO STAFF THEM ACCORDINGLY.

I AM PARTICULARLY CONCERNED BECAUSE OF THE RUMORS WHICH HAVE CIRCULATED FROM TIME TO TIME THAT DOT THINKS IT CAN ADMINISTER ITS NEW AVIATION RESPONSIBILITIES WITHOUT ADDING NEW SLOTS. I HOPE THAT THESE RUMORS DO NOT REPRESENT DOT'S REAL THINKING -- IF THEY DO, IT WOULD SHOW THAT DOT IS UNAWARE OF THE IMPORTANCE AND THE COMPLEXITY OF THE PROGRAMS IT WILL BE ASKED TO ADMINISTER.

THE CAB RESPONSIBILITIES WHICH DOT WILL ASSUME AFTER SUNSET ARE OF GREAT CONCERN TO THE CONGRESS. THE PROGRAMS RANGE FROM ESSENTIAL AIR SERVICE AT THE SMALLEST COMMUNITIES TO REGULATORY AND NEGOTIATING DECISIONS AFFECTING INTERNATIONAL AIR SERVICE BETWEEN THE U.S. AND MORE THAN 80 OTHER COUNTRIES. WE CANNOT AFFORD TO HAVE THESE PROGRAMS COME TO A STANDSTILL BECAUSE OF INADEQUATE STAFFING.

CAB EXPECTS THAT WHEN IT SUNSETS IT WILL HAVE ABOUT 340 EMPLOYEES CARRYING OUT THE FUNCTIONS WHICH WILL CONTINUE AFTER SUNSET. THIS IS LESS THAN HALF THE EMPLOYEES CAB HAD AS RECENTLY AS 3 YEARS AGO. THESE EMPLOYEES RANGE FROM JUNIOR ECONOMISTS AND ATTORNEYS TO HIGHLY EXPERIENCED MANAGERS IN THE SENIOR EXECUTIVE SERVICE. BECAUSE OF REDUCED APPROPRIATIONS AND ATTRITION THIS STAFF HAS BEEN REDUCED TO A LEVEL BARELY ADEQUATE TO MEET ITS RESPONSIBILITIES. THOSE RESPONSIBILITIES TRANSFERRED TO DOT CANNOT BE ACCOMPLISHED BY FEWER PEOPLE AFTER SUNSET THAN BEFORE IT, AND DOT WILL RECOGNIZE THAT IF THEY INTEND TO TAKE THEIR NEW RESPONSIBILITIES SERIOUSLY. PARTICULARLY IN A DEPARTMENT WITH OVER 61,000 EMPLOYEES, ANY UNWILLINGNESS TO DEVOTE EVEN SO MODEST A LEVEL OF STAFF RESOURCES WOULD GIVE US PAUSE.

AND FINALLY, A RELATED PROBLEM WE ARE ALL GOING TO HAVE TO GIVE SOME ATTENTION TO IN THE COMING MONTHS IS THE FACT THAT, BECAUSE OF A COMPROMISE IN LAST YEAR'S APPROPRIATIONS CONFERENCE, CAB HAS NO FUNDING AVAILABLE TO IT FOR AUGUST AND SEPTEMBER OF THIS YEAR. OF COURSE, IT WAS ASSUMED AT THE TIME THAT CONGRESS WOULD COME BACK AND PASS SUPPLEMENTAL APPROPRIATIONS TO COVER THIS TWO MONTH PERIOD, AND THIS IS EXACTLY WHAT I EXPECT CONGRESS TO DO. BUT AS MOST OF YOU KNOW, THE LEGISLATIVE PROCESS IS NEVER CERTAIN AND EVEN THE MOST OBVIOUSLY NEEDED LEGISLATION IS NEVER A SURE THING.

IN THE UNLIKELY EVENT THAT NO SUPPLEMENTAL APPROPRIATION WERE PASSED BEFORE AUGUST, THE CAB WOULD HAVE TO SHUT DOWN. THIS WOULD BE A DISASTROUS SITUATION FOR AIRLINES AND CONSUMERS, PARTICULARLY WHERE INTERNATIONAL AIR SERVICE OR ESSENTIAL AIR SERVICE WERE INVOLVED. IN THESE AREAS, AS WELL AS OTHERS, THE ONLY U.S. AGENCY WITH STATUTORY AUTHORITY TO DEAL WITH PROBLEMS WOULD NO LONGER BE ABLE TO ACT. THE SYSTEM WOULD BE PARALYZED. U.S. AIRLINES WOULD NOT BE ABLE TO OBTAIN NECESSARY CAB APPROVAL FOR CHANGES IN THEIR FARES, FOR ADJUSTMENTS IN THEIR ROUTES, FOR SPECIAL CHARTER OPERATIONS, OR FOR ANY OF THE HUNDREDS OF OTHER AUTHORIZATIONS THAT CAB ISSUES EACH MONTH. TO A CONSIDERABLE EXTENT, U.S. AIRLINES WOULD OPERATE AT THE MERCY OF FOREIGN GOVERNMENTS. IF A FOREIGN GOVERNMENT WANTED TO DENY A U.S. AIRLINE A RIGHT TO WHICH THE AIRLINE WAS ENTITLED UNDER THE BILATERAL, THE FOREIGN GOVERNMENT WOULD BE SECURE IN THE KNOWLEDGE THAT THERE WAS NO CAB AND THEREFORE NOT EVEN THE POTENTIAL FOR APPROPRIATE ACTION AGAINST THAT FOREIGN COUNTRY'S CARRIER.

THE ESSENTIAL AIR SERVICE PROGRAM WOULD BE IN SIMILAR DISARRAY. THERE WOULD BE NO CAB TO ENSURE THAT SERVICE CONTINUED TO BE PROVIDED WHEN AN ESSENTIAL AIR SERVICE CONTRACT ENDED, OR WHEN AN AUTHORIZED CARRIER WAS UNWILLING OR UNABLE TO CONTINUE SERVICE.

AND OF COURSE CONSUMERS WOULD HAVE NO RECOURSE IF SOME CARRIERS FAILED TO OBSERVE EXISTING CONSUMER PROTECTION REGULATIONS; IF CARRIERS STOPPED PROVIDING DENIED BOARDING COMPENSATION, NO SMOKING SECTIONS, AND SO ON.

I COULD GO ON WITH A PARADE OF HORRIBLES, BUT I THINK THE POINT IS CLEAR: HAVING U.S. AVIATION AUTHORITIES LOCKED UP IN AN AGENCY THAT IS PREVENTED FROM FUNCTIONING, EVEN FOR A SHORT TIME, HAS THE POTENTIAL FOR DIASTER. THAT IS NOT WHAT ANYBODY WANTED OR INTENDED, AND WE SHOULD ALL HELP INSURE THAT THAT IS NOT WHAT HAPPENS AND THAT THE SUPPLEMENTAL IS PROVIDED FOR.

THESE ARE THE KINDS OF ISSUES WE FACE AS WE COUNT DOWN TO JANUARY 1, 1985, AND TO THE CONCLUSION OF OUR TRANSITION PERIOD TO DEREGULATION. WE HAVE COMPARATIVELY LITTLE TIME TO MAKE THE NEEDED ADJUSTMENTS. THERE IS NO GUARANTEE THAT, IN TRYING TO DO WHAT NEEDS TO BE DONE, WE ARE IMMUNE FROM FAILURE. YET I DO NOT KNOW HOW WE COULD EXPLAIN TO OURSELVES OR TO THE TRAVELLING PUBLIC THAT WE CHOSE TO FAIL BY NOT EVEN TRYING. I THINK WE ALL HAVE THE OBLIGATION TO MAKE THE FINAL MONTHS OF THIS TRANSITION AS SMOOTH AND AS UNDISRUPTIVE AS WE CAN AND AS THOSE WHO RELY ON US DESERVE. I TRUST THAT IN THE NEXT FEW MONTHS, AS IN THE PAST, I CAN RELY ON YOUR ADVICE, YOUR GOOD JUDGEMENT, AND YOUR ASSISTANCE.

THANK YOU.

STATEMENT OF
AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC.
ON CONTINUATION OF CAB AVIATION STATISTIC COLLECTION
SUBMITTED TO
SUBCOMMITTEE ON AVIATION
COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION
UNITED STATES HOUSE OF REPRESENTATIVES

March 1984

STATEMENT OF ISSUE

CAB aviation statistics have been available to U.S. manufacturers of commercial airframes and engines, and allied industries for over 40 years. With the Sunset of the CAB, we are concerned that this valuable resource may be lost. We have worked with government agencies to reduce the burden of reporting to the U.S. airlines. It is our belief that an 80% reduction, from the requirements that existed prior to deregulation, can be achieved while providing the minimum essential data for our industry. Most of this reduction has occurred through the elimination of non-essential data and consolidation of accounts. We believe that such action already has relieved the U.S. air carrier industry from much of the reporting burden with which they had to comply prior to deregulation.

AIA recommends legislative action to do the following:

(a) Authorize the Department of Transportation to collect aviation data.

(b) Require air carriers to report minimum essential data.

(c) Require the Department of Transportation to adopt procedures in conjunction with the airlines, airframe and engine manufacturers, government agencies and other interested parties to define the minimum essential data while reconciling costs and benefits.

(d) Define minimum essential data as that for which no timely, cost-effective alternative is available.

IMPORTANCE OF DATA

The industry and public as air travelers have benefitted greatly from the availability of the CAB aviation statistics for many years. Traffic and operating cost trends are continually monitored so that airplane design studies can be directly related to future airline needs. The airframe and engine manufacturers have used these statistics to develop design requirements for new and derivative airplane models. The results of these design efforts have provided the airlines with efficient airplanes at the appropriate time. The improved efficiencies have led to new models with lower operating costs than the costs for older airplanes.

The U.S. manufacturers have used these CAB statistics to develop highly sophisticated analytical capabilities to support their business decision-making process and the resulting resource commitments. The commercial airplane market has always been a high-risk, intensely competitive business. The nature of our products requires investments in research and development, extensive production facilities, as well as heavy financial resources to maintain the program until the airplane enters service in sufficient numbers to recover costs. The recovery of these large investments can take as long as ten to fifteen years from a successful program go-ahead. Airplane design and production requires a well-positioned product and a customer base of global dimensions to achieve a positive return on investment. During the past twenty years, the U.S. manufacturers have developed and placed in production eight entirely new types of jet transports. Potential new airplane configurations are extensively analyzed considering traffic demands, airline marketing strategies, current and prospective fleets, and operating economics prior to selecting the final product. Such in-depth analysis is requisite since the final product, with its very high dollar investment, must be right to reduce the risk of failure.

A proper understanding of the air carrier industry is a fundamental prerequisite to the development of new airplane types which will have a wide application in future years. The availability of the CAB data has allowed the U.S. industry to acquire such an understanding of the commercial jet airplane market requirements. Although comparable data does not exist for most of the international marketplace -- the U.S. data has provided the U.S. industry with a unique competitive advantage. The U.S. marketplace is highly diverse. An airplane with the flexible operating characteristics which satisfy U.S. air carrier requirements has broad world wide application and will sell well in many parts of the world. The reverse is not true. An airplane designed with the narrower requirements of a foreign region, such as Europe, will not sell well in the U.S. This fact has served the U.S. airframe and engine manufacturers well. For example, of the approximately 6,200 airplanes produced by U.S. manufacturers in the past 20 years, over half were purchased by non-U.S. airlines. If the U.S. manufacturers are to retain their leadership in the production of commercial airplanes, they must continue to make their business decisions based on an in-depth understanding of the U.S. airlines. Since manufacturers cannot afford the risk of designing an airplane that is optimized uniquely around the design requirements of their first customers, they must be able to evaluate the needs of future customers and select a balanced design. CAB statistics are essential to these decisions.

The currently reported CAB statistics consist of operating cost, financial and traffic data for significant U.S. carriers. These data series are the principal source of reliable, consistent, and timely statistics used by the industry to support management, planning and design decisions.

The airframe and engine manufacturers are not the only users of CAB statistics. The private sector of the industry has many related companies and organizations who use the data. The airlines use the data to evaluate new airplane purchases, marketing decisions, route planning and scheduling. Banks and insurance companies use the data to analyze and support loan decisions. University research and course offerings in flight transportation are based on the existence of these statistics. There are other private sector users of the data, including consultants, publishers, investment brokers, and industry associations. Government agencies (federal, state and local) use the data as a basis for forecasts and planning decisions relative to airways and airport capacity. The manufacturer's data requirements are no greater than the government's requirements.

Hundreds of millions of dollars have been invested to develop sophisticated analytical capabilities that rely on the CAB statistics, which have been available for some four decades. Availability of these sophisticated analytical capabilities and support data has been a major factor in the maintenance of U.S. leadership in the manufacture and sale of commercial airplanes. U.S. airframe and engine manufacturers have also developed entire analysis and evaluation methods assuming the continued existence of the necessary CAB data. Elimination of these data would result in a major loss of analysis capability and obsolescence of a proven and required methodology.

For example, the CAB statistics are the basis for tracking operating cost trends for airframes and engines that are used in design improvement studies. Modifications are designed to enhance the performance and operating cost of existing equipment. The ability to compare forecasts with actual performance enables manufacturers to identify areas for potential improvement. Industry-wide statistics are essential to this process so that the effect of the variety of operating environments can be reflected and differences in operating performance can be more clearly identified with the airframe or engine rather than with one airline's operational peculiarities. Efforts can then be focused on design improvements and new designs.

RECOMMENDATION

The Aerospace Industries Association recommends that the following language be inserted in the appropriate House legislation:

Amend Section 407 by adding the following subsection:

> "The authority of the Civil Aeronautics Board under Section 407a of the Federal Aviation Act of 1958 (49 U.S.C. 1301 et. seg.) to require annual, monthly, periodic and special reports from any domestic or foreign air carrier shall be transferred to the Department of Transportation, effective date of enactment. The data to be collected by the Department of Transportation shall include all data required to support CAB programs that will transfer at Sunset as well as the data required to support legislated programs of other Federal Agencies. Nothing in this subsection shall, however, either authorize the Secretary to discontinue the periodic collection of comprehensive data, including as a minimum, passenger origin and destination survey data, service segment data, and essential financial and cost data or prohibit the Secretary from requiring all air carriers providing the same services to provide the same data. Such data shall promptly be made available, on a cost reimbursable basis, to all interested persons so as to enhance competition within the airline industry."

THE POSTMASTER GENERAL
Washington, DC 20260-0010

March 12, 1984

Dear Mr. Chairman: [illegible]

As you know, the Postal Service is one of the parties directly affected by the Airline Deregulation Act of 1978. Accordingly, although we are not testifying at the Aviation Subcommittee's present hearings on this subject, we wish to assure the Subcommittee of our continuing concern over, and to advise the Subcommittee of the actions we are taking to further, a smooth transition to the deregulated environment contemplated by the Act.

The Postal Service has been diligently engaged in preparing itself for the sunset of the Civil Aeronautics Board and the subsequent responsibility to contract for air transportation service. In August 1981 we set up a Postal Service Task Force to plan an air contracting system to be implemented upon the sunset of the Civil Aeronautics Board. Given the task of designing a system to replace a regulated domestic air transportation network that carries in excess of 1.6 billion pounds of mail in more than 24,000 markets, the task force set to work immediately. The planning for the replacement of this network through USPS procurement has been substantial and has included significant input from all major transportation suppliers with whom we presently do business, as well as others that have shown interest in doing business with us in a deregulatory environment.

We received carrier input during two industry meetings conducted in 1982 and 1983. Based on their comments and concerns, and the mutual concerns of the Postal Service, solicitations for air transportation service have been developed. We believe that all major concerns expressed by the air industry have been addressed and adequately provided for in the contractual requirements of these solicitations. Identified as the "segment contract" and the "system contract," solicitations for this service were issued on January 30, 1984. Reponses are required not later than April 2, 1984.

The first of the solicitations, called segment, specifies precise time frames during which transportation service is required between each of some 2600 origin to destination segments. In addition, specific minimum weight volumes of mail are required for each segment and are used to guarantee minimum revenue for each segment. Correspondingly, a maximum lift capacity by segment must be guaranteed by the air carrier.

The second solicitation issued is called the system solicitation and requires that an air carrier provide transportation for mail tendered on each of its scheduled flights. The boarding priority will be essentially the same as that enjoyed by the Postal Service today, that is, mail is to be boarded after passengers and their baggage.

Under conditions where a segment contract is in place between an origin and destination served by an air carrier's system, the carrier may be tendered mail on a "priority" boarding basis as described above, or on a "space available" basis. Separate rate offers for these various services are requested as part of the system solicitation.

Both of the solicitations require a quotation for ground handling services and both contracts have provision for adjustments in compensation caused by changed economic conditions.

Regardless of the contracting methodology used, significant responsibilities and opportunities will be afforded both the carriers and the Postal Service as a result of the contract environment. The Postal Service is taking advantage of its already in-place integrated data base system which supports the dispatch and routing functions required for the transportation of mail. In addition, a sophisticated weighing and billing function is being developed which will provide for an automated system of determining compensation due a carrier under a contract environment. This system will further enhance the Postal Service's ability to monitor and control the flow of mail through its complex transportation network.

Coordination with the Department of Transportation is taking place to assure a smooth transition of functions currently administered by the Civil Aeronautics Board.

In summary, the Postal Service is presently putting into place its plans for the sunset of the Civil Aeronautics Board. Through the cooperation of the airline industry and the Department of Transportation, the Postal Service expects to enter the era of deregulation smoothly and to the overall advantage of the air industry and the general public.

Sincerely,

William F. Bolger

Honorable Norman Y. Mineta
Chairman, Subcommittee
on Aviation
Committee on Public Works
and Transportation
House of Representatives
Washington, D.C. 20515

STATEMENT OF FRONTIER AIRLINES, INC.
BEFORE THE AVIATION SUBCOMMITTEE
OF THE COMMITTEE ON PUBLIC WORKS
AND TRANSPORTATION
U.S. HOUSE OF REPRESENTATIVES
ON SUNSET OF THE CIVIL AERONAUTICS BOARD

Frontier Airlines, Inc. is a participant in the Joint Statement on Sunset Matters submitted by sixteen carriers which was presented to this Committee by Richard D. Mathias, Senior Vice President - Government Affairs, of Pan American World Airways, Inc., on March 14, 1984. Frontier is submitting this Statement to offer further support for the Joint Statement's comments on the future of Section 411 of the Federal Aviation Act.

The Joint Statement urges that Section 411 be continued in effect for domestic air transportation and that responsibility for administering it be lodged in the Department of Transportation. It explains that among the most compelling reasons for continuing Section 411 are anticompetitive abuses of computer reservations systems ("CRS") (Statement at 3).

As the Committee is aware, the CAB is addressing these CRS abuses in a rulemaking proceeding pursuant to Section 411. If a successor agency does not have Section 411 authority when the CAB expires at the end of this year, there will be no expert body to deal with deceptive and anticompetitive CRS practices. This is a serious problem because the major CRS owners undoubtedly will continue to engage in such abuses as long as they have market power in the CRS industry.

The necessity for lodging Section 411 authority in a successor agency is graphically illustrated by a very recent CRS development. In February, United Air lines issued the following ultimatum: as of April 1, 1984, it will remove from its CRS all references to the flight schedules of two small carriers, Frontier Horizon, Inc. and Combs Airways, Inc., unless those carriers cease using Frontier's two-letter airline designator code "FL" in Apollo's CRS. Frontier understands that United has issued the same ultimatum to numerous other carriers.

The CAB, to its credit, has, on an emergency basis, just adopted a rule which prohibits United from carrying out its plan (CAB Regulation ER-1377, adopted March 27, 1984). As the Board explained in its Notice of Proposed Rulemaking ("NPR") which accompanied the rule when it was proposed, "the potential for the use of market power to significantly reshape and adversely affect air transportation competition makes it imperative that we act immediately in this emergency situation." (NPR at 2.)

If the CAB had not adopted an emergency rule, serious anticompetitive and deceptive consequences would have occurred beginning April 1. To explain how competition and consumers would have been injured, we must begin with a brief description of a new competitive service inaugurated by Frontier to enhance competition with United.

Denver is the hub of Frontier's hub-and-spokes route configuration. United, the nation's largest airline, also operates a major hub-and-spokes network at Denver, and the two carriers compete over many of the same Denver-hub routes. One of United's advantages over Frontier is that Frontier's route network is much smaller than United's vast national network. As a result, Frontier cannot provide online connecting services in as many markets as does United. This is a disadvantage to Frontier because consumers prefer online connections over interline connections. Since United serves more routes to and from Denver than does Frontier, it can offer online connections on more routes from one side of Denver to the other than can Frontier, and in the last few years United has greatly increased the number of "spokes" radiating from Denver.

To compete with United's vast online-connection capability, Frontier has entered into marketing alliances with two Denver-based carriers, Frontier Horizon and Combs. Combs, which provides service under the name "Frontier Commuter" between Denver and several small cities in the West, has a franchise-type relationship with Frontier, modeled on the long-standing "Allegheny Commuter" Program. Frontier

Horizon, which is owned by the same parent that controls Frontier (Frontier Holdings, Inc.) furnishes long-haul service between Denver and several large cities.

By virtue of the Frontier-Frontier Horizon and Frontier-Frontier Commuter marketing alliances, a passenger connecting between a Frontier flight and a Frontier Horizon or Frontier Commuter flight enjoys the same comfort and convenience as he would on an online connecting flight. In other words, to the consumer, a Frontier-Frontier Horizon and a Frontier-Frontier Commuter connection is the equivalent of an online connection.

The special nature of the connecting service developed by these three carriers (the "Frontier Family") results from the following specific arrangements:

-- Flights of the Frontier Family all arrive and depart from the same concourse at Denver's Stapleton Airport.

-- Frontier Horizon and Combs carefully mesh their schedules with Frontier flights to and from Denver in order to achieve optimum schedule coordination.

-- When a Frontier inbound flight is delayed, Combs and Frontier Horizon apply the same policy for holding their connecting flights as Frontier does for online connections.

-- Frontier Horizon and Combs observe the same detailed performance criteria as does Frontier.

-- Frontier Commuter passengers may use Frontier's special assistance counter and lost-and-found facility at Stapleton Airport. Arrangements are now being finalized to make this service available for Frontier Horizon passengers as well.

-- Baggage transfers for Frontier-Frontier Horizon and Frontier-Frontier Commuter flights at Denver are handled in the same facility and receive the same treatment as do baggage transfers for Frontier online connections.

-- Frontier Commuter flights and Frontier Horizon flights are displayed in Frontier's Flight Information Display System at Denver and in Frontier's timetable.

-- Frontier Horizon and Combs use Frontier's reservation system.

-- Through participating travel agents, Frontier-Frontier Commuter passengers can obtain boarding passes in advance for both legs of the transportation. And, for those passengers who do not book their reservations through agents, boarding passes for both segments of Frontier-Frontier Commuter service are issued when the passenger checks in for the first segment. Arrangements for these same conveniences have been agreed upon and will soon be available for Frontier-Frontier Horizon passengers.

-- For Frontier's Frequent Flyer program, mileage on Frontier-Frontier Commuter and Frontier-Frontier Horizon connections has the same value as does mileage on Frontier online connections.

In addition, in many circumstances, Frontier-Frontier Horizon service actually is faster than or essentially equal to competing online connecting services of the major CRS owners, United and American Airlines, in total elapsed trip time.

Thus, despite the fact that Combs, Frontier Horizon and Frontier are completely separate entities, each with its own aircraft, management and other personnel, they have, through marketing alliances, developed special interline services which, from the consumer's standpoint, (1) are generally as desirable and often more desirable than competitive online connection services of the larger carriers and (2) are superior to interline services of those carriers.

The only way that Frontier and its allied carriers can signal to Apollo users that the Frontier Family is offering a special kind of service that matches or even exceeds the convenience of online connecting services of other carriers is to use a common designator ("FL") for both legs of the connecting service. If a common code were not used, the Frontier-Frontier Commuter and Frontier-Frontier Horizon listings in Apollo would be indistinguishable from ordinary interline connecting services. In other words, if United succeeded in stopping the Frontier Family from using a common code, Apollo would misrepresent to travel agents that Frontier Family connections are nothing more than ordinary interline connections. As a result, passengers who would otherwise have been booked on Frontier Family flights would be ticketed on ordinary interline service. The traveling public would unnecessarily suffer the inconveniences of ordinary interline connections and the Frontier Family would suffer the loss of business.

Another serious problem which the Frontier Family would face if they did not use a common code is that Frontier-Frontier Horizon and Frontier-Frontier Commuter connections would automatically drop to an inferior category in the sequence in which flights are displayed in Apollo. The net effect of this would be that Frontier Family connections would be buried in the back screens of Apollo and, therefore, would be much less noticeable to travel agents while United's online connections would be featured on earlier screens. This change would seriously affect Frontier, Frontier Horizon and Combs because travel agents are much more likely to select a flight from an early screen than from later screens of a CRS.

Unfortunately for United, it could implement this deceptive and unfair scheme only with Frontier's "cooperation." Generally, Apollo does not obtain a carrier's flight schedule information directly from the carrier. Instead, on a weekly basis the carrier furnishes the OAG with schedule data which the OAG prints in its own publication and transfers to computer tapes which it sells to Apollo. Apollo then loads these computer tapes into its system. Since Frontier submits Frontier Horizon and Frontier Commuter connecting flight schedules to the OAG using Frontier's "FL" designator code, their schedules are automatically shown under the FL code in Apollo. Apollo is incapable of changing the designator code itself.

To obtain Frontier's cooperation, United resorted to a heavy-handed tactic. As noted, in February United issued an ultimatum: if Frontier did not accede to United's demand that Frontier Horizon and Frontier Commuter cease using Frontier's code, United would simply pull the plug on

Frontier Horizon and Frontier Commuter on April 1 and their schedules would disappear from Apollo entirely.

Were it not for the CAB's timely intervention, the Frontier Family would have been forced to comply with United's demand. This is because United's Apollo is used by so many travel agencies that delisting would have unacceptable financial consequences for the Frontier Family. Apollo is the "eyes" for travel agents which account for 72% of travel agent bookings in the Denver area, which is the hub of the Frontier Family's hub-and-spokes route system.

If Frontier Horizon and Frontier Commuter were dropped from Apollo, they would cease to exist for Apollo agents, and the Frontier Family would lose countless passenger revenues that would otherwise have been obtained through those agents. The loss of passenger traffic would decrease their load factors significantly and greatly increase per-passenger costs, with a potentially serious effect on profits. In short, the Frontier Family would have no alternative but to keep Frontier Horizon and Frontier Commuter on Apollo and, therefore, they would have acceded to United's April 1 ultimatum.

United's gun-to-the-head approach and the Frontier Family's inability to resist demonstrates that market forces are not in equilibrium. It shows that United has enormous market power. Thus, Frontier's dilemma verifies the CAB's finding in its notice accompanying the proposed emergency rule that:

> Our analysis shows that the major airline-owned CRS systems have substantial market power which can be exerted today by altering or purging their systems of flights offered by two carriers, under a joint marketing agreement that provides for a single designator code, and thus is currently considered as an "on-line" connection.

(NPR at 10.)

United has, quite simply, arrogated to itself the right to determine when, if ever, it is appropriate for carriers to share a common designator. Fortunately, because the Board still exists, it can prevent United from misusing its market power in this manner. But as of January 1, 1985, the Board will no longer exist, and there will be no federal agency to take over this vital function to prevent the major CRS owners from imposing anticompetitive rules on their airline competitors.

Not only does United's action underscore the necessity for preserving the authority to enforce Section 411, it also demonstrates the need for lodging that authority in an enforcement agency which is able to act quickly to stop each new CRS abuse. As the Joint Statement explains, a swift response is more likely to come from the Department of Transportation than from the Federal Trade Commission (at 6-7). This prediction is supported by the FTC's track record of often taking years to resolve antitrust and consumer protection disputes.

In conclusion, United's April 1 ultimatum, which is the latest in a continuous stream of CRS abuses by the major CRS's, would have had serious anticompetitive and deceptive consequences were it not for quick action by the CAB. CRS abuses will undoubtedly persist after Sunset occurs, and, therefore, it is essential that authority to enforce Section 411 be preserved and be lodged in the Department of Transportation.

March 29, 1984

James L. Kolstad
Senior Director Communications
and Public Affairs

INTERNATIONAL BROTHERHOOD OF TEAMSTERS
CHAUFFEURS • WAREHOUSEMEN & HELPERS
OF AMERICA
25 LOUISIANA AVENUE, N.W. • WASHINGTON, D.C. 20001

RECEIVED
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NORMAN Y. MINETA, M.C.

April 6, 1984

The Honorable Norman Y. Mineta
Chairman, Aviation Subcommittee
Committee on Public Works & Transportation
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Mineta:

RE: Legislative Proposals Relating to Airline Deregulation and CAB Sunset.

The International Brotherhood of Teamsters, as collective bargaining representative for approximately 30,000 workers employed by air carriers, strongly urges this committee to consider the adverse impact of deregulation and CAB Sunset on airline employees and to enact adequate safeguards.

The IBT strongly opposed the enactment of the Airline Deregulation Act of 1978. Our former General President Frank E. Fitzsimmons expressed the union's concerns when he stated to the Senate Subcommittee on Aviation, Committee on Commerce, Science and Transportation on March 25, 1977:

> "We oppose... because we firmly believe that 'airline deregulation' or 'regulator reform' as proposed, will lead to long-term unemployment, employee dislocation and hardship, lower wages, reduced benefits, and poorer working conditions for those workers lucky enough to retain their jobs in the transportation industry."
>
> "In opposing, ... we believe that not only are we protecting the interests of our membership but also that we are acting in the public interest."

Unfortunately, the predictions of job losses, bankruptcies and economic turmoil have all come to be true. The employees of the airline industry have borne the full burden of deregulation. The labor protective provisions enacted by the Congress in the Airline

Deregulation Act of 1978 have not protected or even eased the adjustment process for a single employee in the almost seven years since enactment.

Congress did recognize that deregulation might cause difficulties for some airline employees. The Senate Committee Report in 1978 stated:

> ".. the Congress, on behalf of the American people, must insure that the benefits to the public which result from its decision to alter substantially the regulation of air transportation are not paid for by a minority - the airline employees and their families who have relied on the present system "(S. Rpt. No. 95-631, 95th Cong., 2nd Session at 114 (1978).)"

The CAB, however, has not fully recognized that deregulation can cause harm. Under the Act, employees and unions must demonstrate to the CAB that the Act is the major cause of their unemployment. The CAB has interpreted the Congressional intent so harshly that we will be amazed if any laid off employee ever collects a cent in assistance payments under the provisions of the Act.

At a minimum we suggest that the present Section 43,49 U.S.C.A. S1552 (h)(2), be amended by striking the bracketed words and adding the underscored language as follows:

> "The term 'qualifying dislocation' means a bankruptcy or major contraction of an air carrier holding a certifcate under Section 1371 of this title, occurring during the first 10 complete calendar years after October 24, 1978, (the major cause of) to which (is) the change in regulatory structure provided by the Airline Deregulation Act of 1978 contributed importantly,..."

Sunset of the CAB may cause additional hardships to airline employees involved in mergers. The Congress should mandate that the present CAB policy of providing for integration of seniority lists, minimum income assistance to those who lose their jobs, and arbitration of disputes in mergers must continue past Sunset. At a minimum the labor protective provisions that the CAB has routinely imposed in airline mergers must be codified and enforced by a government agency after Sunset.

If the Congress does not codify the merger LPP's then employees of an acquired carrier after Sunset may well lose their jobs to employees of an less service or even to new hires. There would be no requirement for an equitable merging of seniority lists. The surviving carrier, under current court interpretations of the Railway Labor Act, may be under no obligation to respect the protective arrangements negotiated by the union's representing the workers of the acquired carrier.

The International Brotherhood of Teamsters firmly believes that airline employees who have suffered from deregulation must receive the adjustment assistance Congress provided in 1978. Furthermore, Congress must prevent future suffering by providing for equitable treatment and assistance for workers for airline mergers occuring after CAB Sunset.

Sincerely yours,

William F. Genoese
Director
AIRLINE DIVISION

WFG/dls

cc: Paul Locigno, Director
Governmental Affairs

STATEMENT OF LUCIUS G. HILL, III
BEFORE THE
SUBCOMMITTEE ON AVIATION
COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION
UNITED STATES HOUSE OF REPRESENTATIVES
MARCH 14, 1984

Honorable Chairman Norman Mineta and members of the Subcommittee, I appreciate the opportunity to submit this statement of my personal view -- backed up by years of experience in the aviation industry -- and on behalf of the many other pilots who share my same position and concerns.

I am a Captain with one of the nation's major airlines and a member of the Airline Pilot's Association, but the views expressed in this statement are my sole responsibility and not to be construed as necessarily reflecting any company or organization.

Mr. Chairman, I do not hesitate to make my views known to this Committee because I am a strong believer in our democratic form of government, which exists at the express wish of its citizens for protection and charged with the responsibility of insuring that all individual rights remain guaranteed.

There is a fine line between warranted protection and unnecessary interference in the daily lives of citizens, or the intrusion into the basic right to freedom of choice. I fear that Congress is on the verge of dismantling that freedom of choice, as with the Employee Protection Provisions of the Airline Deregulation Act of 1978 under consideration today. And once lost, that is a right which may well be irretrievable. When personal and corporate initiatives are required to be squeezed through the narrow objective of actions "being for your own good," we are embarking on an experiment in contorted democracy that is doomed to failure at the outset.

We embued our form of government with the guarantee of freedom of choice. We require it for ourselves and of our government. We use it, despite the inherent dangers that we may be wrong. Without it, the quest for excellence, the challenge of competition, the very expression of individuality are lost. In that sad state, democracy does, indeed, become hypocracy.

I have been a Check Airman -- charged with the responsibility of insuring the highest degree of proficiency among my colleagues in the airline industry -- since December 1, 1982. I have held the responsibility for training Captains and First Officers on the Boeing 737 and conducting semi-annual checks to already qualified Captains and annual checks to First Officers.

During that 15 months, my airline hired over 300 pilots from the pool of those qualified as "protected" under the provisions of Section 43 of the Act. The average age of these pilots is 42, and they now comprise over 30% of our pilot force -- 321 of our 1,042 pilots. If you combine the protected group with the 38 - 46 year old pilots already with the airline, over 60% of our pilots will retire between 1998 and 2006.

This projection is based on present seniority through February 1984 and does not include the additional protected pilots to be hired through 1988.

Over the next 18 months, my airline plans to hire over 250 pilots to man the aircraft now scheduled for delivery. And if we can continue to show a profit, further expansion and comensurate personel increases are inevitable.

During the critical eight year period between 1998 and 2006, my airline will hire and train more than 75 pilots per year, excluding any future hiring. That level of training involves enormous costs and extensive non-productive pilot time spent in a five week school. This will be a highly difficult period for the airline, which will have to weather this financial and personal crunch for eight years unabated.

The capital available in this country is finite. The capital available for any industry is limited. If the airlines are faced with severely limited corporate and marketing choices due to additional government requirements, we will be at a standstill. This is one important personal observation about my particular employer.

My airline is not the only major carrier making a profit. That list also includes American, USAir, Northwest, United, and Delta, to name a few. Yet my airline has already hired more protected pilots than all those combined. That is an impressive record for any individual company, but the point is: Why should one airline, or a handful, be forced to carry the burden for the whole industry merely because they are profitable?

Hiring pilots from the protected group, contrary to the expectations of some, has not reduced our training costs. It has actually increased costs in several areas. Initially, I trained only former-Braniff Captains as First Officers on the Boeing 737. For these experienced aviators, handling the simulator posed no great difficulties, but learning the procedures of the 737 versus the 727 or the DC-8 required retraining. In comparison to the 727 and the DC-8, which are like a Cadillac with cruise control, the 737 is a five speed Toyota without power anything. The transition for pilots is relatively easy, but acquiring new procedural knowledge is necessary. It took me as long to retrain these eminently qualified aviators as it did to train a previously non-qualified First Officer.

My airline also hired furloughed pilots who had originally been hired by TWA and Pan American in 1968 and 1969, and had actually been "on the line" only four to eight years. They had never qualified for more than Flight Engineer/Second Officer position and never flown a commercial airliner.

The former TWA personnel were not as qualified for pilot positions. However, due to our rapid expansion, they were able to step immediately from unemployed to First Officer status on a 737. Many had not flown anything since leaving the military. As a result, additional training beyond the norm was required for all those I trained. This required me to spend extra time in briefs and debriefs, plus extra periods in the simulator. The TWA personnel had been away from the cockpit for too long. There was a substantial increase in training costs from those we experienced when training unprotected pilots a year earlier.

The requirement for "first to hire" has forced the airline to accept some individuals we might not have previously accepted, for fear of litigation. This involved a very basic right of freedom of choice by any company. The subjectivity of the selection process in hiring prospective employees is reduced, to the detriment of the company and the public we serve.

There is also the question of reverse discrimination. Under these circumstances, what happens to pilots who have never worked for an airline, or even those who are airline pilots but were not employed prior to October 1974? Are not they suffering job discrimination?

Although I am now a company Check Pilot, I belong to that group not employed prior to October 1974. If my now profitable employer were to go defunct tomorrow, too bad for me. Yet under current circumstances, some 300 pilots junior to me would still be protected. Why? Because each is allowed by Section 43 to "retain his rights of seniority and right of recall with the air carrier that furloughed or terminated him." Each also has a deferral period of two years before making a choice of recall -- a period of limbo unfair to both carriers. In the realities of the marketplace, this also becomes critical to my airline if Braniff or TWA are able to grow and expand, strengthening their financial position over the next three to five years. My airline can only hope its newer employees establish their new loyalty quickly.

As an unprotected pilot, I am not interested in changing the dates for pilots eligible for protection. I would like to see the elimination of Section 43 entirely. The funds called for under this Section were never allocated for "monthly assistance payments, reimbursement payments or assistance for relocation."

(Section a, b, c). How can Congress insist on enforcement of Section 43d - "duty to hire protected employees?" It would be better to exercise Item F1 -- "The Secretary may issue, mend, and repeal such rules and regulations as may be necessary for the administration of this section" -- to do away with Section 43.

Congress is now grappling with a very difficult problem. How do you legislate deregulation of the airline industry and at the same time protect new entrants and force the protection of employees from crippling expenses?

What ever happened to competition in the marketplace? Does this country need legislation to protect the small business man and woman who file Chapter 11 because they are unable to compete? What is happening to this great nation, founded on the ideal of "opportunity", which meant the opportunity to fail as well as to succeed? No government in a free society can protect all the people from failure, so why discriminate heavily against the many to protect only a few from failing?

We became the strongest nation in the world by fostering a rich heritage of freedom of choice for the people. The people made this nation great and must be left free to choose.

TRANS WORLD AIRLINES, INC.
605 THIRD AVENUE · NEW YORK, NEW YORK 10016 · U. S. A.

[illegible]
NORMAN Y. MINETA, M.C.

March 12, 1984

OFFICE OF THE
PRESIDENT

The Honorable Norman Y. Mineta
Chairman
Subcommittee on Aviation
Committee on Public Works and Transportation
U. S. House of Representatives
Washington, D. C. 20510

Dear Mr. Chairman:

It was a pleasure to see you last week at the ATA Board of Directors meeting. I fully support your efforts to secure a bill and, in general, your preliminary views regarding the substantive corrections that are required.

I do, however, want to take this opportunity to clearly establish TWA's position on the various issues which you raised and which are being aired during your hearings.

First, the Agreements and Antitrust Immunity provisions of the Federal Aviation Act, Sections 412 and 414 respectively, should be transferred to the Department of Transportation.

We have had a long history working with the Justice Department, particularly in the field of international aviation. Ideologically, they are unable to understand or cope with the complexities of the international system and the necessity for maintaining various international agreements covering such broad subjects as tariffs, interline agreements, common rules for baggage transfer, standard ticket stock, and clearing house procedures. Over the past years, the Department of Justice has consistently opposed agreements filed with the CAB and, in those instances where they did not oppose, they generally took the position that the Board should not grant immunity. Without criticizing the Justice Department for ideological purity or rigid adherence to the antitrust laws, the fact remains that the laws were enacted well before we had an international aviation structure with all its ramifications and carrier and consumer benefits.

On the other hand, the Department of Transportation, which has and will retain the primary responsibility for international aviation policy, understands the complexity of the system and the relationship between many of the agreements and the structural aspects of the bilateral aviation system. More importantly, it will be possible for the Transportation Department to make a finding that certain agreements should be exempt from the antitrust laws on the basis that "such exemption is required in the public interest". The Justice Department will not be able to make that finding and, based on our discussions with them, they certainly will not be inclined to immunize many of the agreements which they might approve under Section 412. The Justice Department position is clear as outlined in the DOT plan:

> "The agreements that the Department concludes do not contravene the antitrust laws will be approved but will not be granted antitrust immunity except in those cases where conduct has been or is likely to be the object of frivolous antitrust litigation. In such cases, the immunity granted by the Department may be limited so as to apply to treble damage actions only."

Lastly, the rigid and institutional antitrust attitudes that prevail within the Department of Justice have and will continue to ignore the foreign policy implications of the international aviation network and the various bilateral air agreements. Therefore, it is absolutely essential that these provisions be transferred to the Department of Transportation.

Second, Methods of Competition, Section 411 of the Act, should be transferred to the Department of Transportation.

While conceptually I have no problem with Section 411 authority residing with the Federal Trade Commission, I am extremely concerned about the potential for split jurisdiction. As it now stands, Section 411 covering international aviation transfers to the Department of Transportation. Given the overall policy responsibility of DOT in the field of international aviation, that is as it should be. Since TWA derives in excess of fifty percent of its revenues from the international market, we could, with FTC jurisdiction in domestic matters, end up with a tremendously complex and conflicting regulatory scheme. Not only could this affect rules and regulations relating to flights but also, to passengers. Thus, a passenger on the domestic leg of flight 890 would be covered under one set of regulations, while the person sitting next to him on that same flight, but ticketed from an interior point to Paris, would be governed by a different set of regulations.

Third, the only issue on which the entire industry agrees, is the need to strengthen federal preemption.

Since there is full agreement, I will not bore you with my views in that regard.

The last issue is the one of insulation in carrier selection cases for limited entry international routes.

The ATA position, as you know, is that the process should remain as it is today up through the law judge recommendation stage. There are adequate rules and regulations to insulate the Administrative Law Judge from ex parte contacts and that system has worked well over the years. As I understand it, there is an Administrative Law Judge system in place today in many parts of the government and I don't understand why carrier selection cases could not be handled under the same rules and procedures which pertain to existing ALJs.

Once the law judge has rendered a decision, that decision would be subject to review by the Secretary or her designated representative, but could only be remanded within the parameters defined by a rulemaking which would establish carrier selection criteria. The obvious missing link, at this stage, is that the Department of Transportation must issue an NPRM leading to a Final Rule which would establish carrier selection criteria. Since the rulemaking would take place in the public view, with appropriate comments by all interested parties, I believe that a Final Rule would be reasonably structured. Thereafter, the law judge's decision could only be remanded if his conclusions deviated from the principles and guidelines specifically established by that rule.

The reason I am adamantly opposed to establishing a Board or mini-Board at the DOT is that I believe it would, as it does today, take review of many matters which can be handled either through rulemaking or by staff under delegated authority. Once a Board has been established, it will, of necessity, build its own staff and become another regulatory body which is exactly what we do not need. Frankly, I believe that those who would like to see a "Board" at the DOT are really attempting to recreate the regulatory process which the Airline Deregulation Act of 1978 did away with.

Finally, and in my view most significant, the Secretary of Transportation will be very reluctant to remand an ALJ carrier selection decision without clear and incontrovertible evidence that there was a major flaw in the decision. The politics of this industry, as you know, are very visible and I do not believe that the Secretary, regardless of party, would want to subject The Office or The Administration to the kind of heat that we all know can be generated when there is any sign of foul play.

I hope these comments are useful in your deliberation and if you would like further clarification on these or any other matters, do not hesitate to contact us.

Sincerely,

Ed

C. E. Meyer, Jr.

cc: Hon. J. P. Hammerschmidt
Mr. J. F. Ash

STATEMENT OF RENATA PAGLIARO, HOLLY SURRING, AND DEBORAH CORVIN, ON BEHALF OF REPUBLIC AIRLINE FLIGHT ATTENDANTS MASTER COUNCIL, ASSOCIATION OF FLIGHT ATTENDANTS

REPORT ON DEREGULATION

Since the passage of the Deregulation Act in October, 1978, the airline industry has been subjected to drastic changes. From our perspective, these changes have produced more harm than good. We no longer have job security, our working conditions have deteriorated, and our pay checks are less than they were three years ago. We also have learned that the situation can become worse as we observe the Continental Flight Attendants technically locked out of their jobs.

However, according to Alfred Kahn, the former chairman of the CAB (Civil Aeronautics Board), the regulated airline industry "sat on it's laurels," over-paid its employees and overcharged the consumer.[1] (Please see attached response to Mr. Kahn's remarks by Flight Attendant Robyn Worley from Memphis.) We have found through our investigation not only that Mr. Kahn's remarks are untrue, but that the consumer has been misled by five years' of blatant lies. As a matter of fact, statistics from CAB indicate that deregulation will result in an oligopoly which means a few airlines surviving. An oligopoly would eliminate competition and cause higher air fares. Secor Browne, who headed the CAB from 1969 to 1973, warned that deregulation will lead to "an airline system with fewer carriers, whose management duty will be to maximize profits without more public service obligation than that of management of the cement works or girdle factory. The wringing out of competition along the road to oligopoly should be as unacceptable to the industry as it is to the public interest."[2]

Our investigation began with the theory that an airline ticket is a bargain compared to other CPI (Consumer Price Index) products. (Please see attached CPI Chart.) By charting airfares for long haul markets we found the prices have not changed much over the last twenty years.

Following is a list of round trip coach air fares from San Fransisco to Honolulu and from San Fransisco to New York from 1963 to 1983.

San Fransisco to Honolulu	San Fransico to New York
1963 - $266.00	1963 - $290.00
1964 - 220.00	1964 - 290.00
1965 - 220.00	1965 - 290.00
1966 - 220.00	1966 - 290.00
1967 - 220.00	1967 - 290.00
1968 - 220.00	1968 - 290.00
1969 - 220.00	1969 - 290.00
1970 - 220.00	1970 - 284.00
1971 - 222.00	1971 - 308.00
1972 - 246.00	1972 - 308.00
1973 - 246.00	1973 - 336.00
1974 - 248.00	1974 - 352.00
1975 - 246.00	1975 - 388.00
1976 - 246.00	1976 - 376.00
1977 - 246.00	1977 - 404.00
1978 - 274.00	1978 - 444.00
1979 - 260.00	1979 - 374.00
1980 - 392.00	1980 - 398.00
1981 - 253.00	1981 - 438.00
1982 - 280.00	1982 - 535.00
1983 - 328.00[3]	1983 - 379.00[6]

1977 and 1978 were the only years that airfares did increase substantially because the price of fuel had gone up.[4] Also, the industry was probably preparing itself for deregulation and charged higher fares before the era of predatory competition and discounts would become a reality. 1978 was the only year that the airline industry ROI (rate of return on investment) reached 13%,[5] an important point that will be explained later.

Even though the price of an airline ticket has not changed much over the last twenty years, the service, safety, and comfort has certainly improved. Before the modern jets came into service, a flight from San Fransisco to New York in DC-7 took about 10 hours with as many as five stops.[6] Today you can fly from San Fransisco to New York nonstop in half the time. You can make hotel reservations, future airline reservations, and rent a car before you reach your destination. Elaborate food and beverage service is available on most flights as well as first run movies on transcontinental flights. Yet airfares are much the same and do not reflect all of the advancements in airline technology.

When the airline industry was regulated, there were all kinds of discount fares available to benefit the consumer. Discount fares were available if you traveled at night or mid-week, for senior citizens, students, families, military and clergy. There was even a "Discover America" fare.[7]

Today the consumer is faced with massive fare rate confusion. Airfares can change daily making it difficult to tell what fare is the lowest. Thomas Cook, Inc., a large travel company estimates that there are 15,000 changes in domestic air fares each day.[8]

"Classes of travelers are discriminated against as frequently as classes of markets, and a business traveler may find that he is paying more than anyone else in the airplane one day, yet flying for free the next."[9]

Unlike the long haul market, airfares in the short haul market have exploded since deregulation began. In 1979, a ticket to Detroit from Fargo, North Dakota, was $92.00. In 1980 it was $160.00.[10] "It can cost the same to travel 400 miles as it does 2,400 miles under today's fare structure," testified Dan May before the Subcommittee on Aviation of the House Committee on Public Works and Transportation. It seem illogical that passengers must pay as much or more to travel a short distance as those who travel a long distance.

Although Alfred Kahn stated that "deregulation is bringing about a stronger, more efficient airline system that serves the public better by offering significantly lower fares,"[11] it appears that the airlines are looking for ways to raise ticket prices. "Perhaps the greatest impetus for fare increases is that so many of the airlines suffered huge losses in recent years."[12] According to a TWA executive, the airlines have suffered deficits totalling more than $4 billion since 1980.[13]

The librarians at CAB, who helped us greatly, introduced us to an economist there. The economist provided us with facts and figures showing the effects of deregulation on the industry. These facts and figures prove the devastating effects of discount fares (competitive pricing) on airlines revenues and profitability. The data, which he compiled from the airlines themselves, show no substantial profit since 1978. The airlines are not making a profit because of uneconomic pricing of tickets, which does not allow them to cover their costs. Keep in mind that all information we received from the CAB covers all U.S. commercial carriers, not just Republic Airlines.

ATA figures indicate that in 1982, more discount fares were sold than anytime since 1978. In 1982, the majors carried 78% of their coach traffic on discount fares compared to 48% in 1978. Also, in 1982 the average discount (percent off full fare) was 46% compared with 34% in 1978.[14]

Chart A shows the percentage of full-fare tickets sold versus discount tickets sold since 1973. Since 1978, many more discounted tickets were sold than full-fare tickets. Even though discount fares are a temporary benefit for the consumer, the airlines suffer from tremendous operating and capitol losses.

15.

A. Percentage of RPM'S in Full Fare or Discount Travel, Scheduled Coach Service of the Trunkline or Major Carriers, 1973-1983

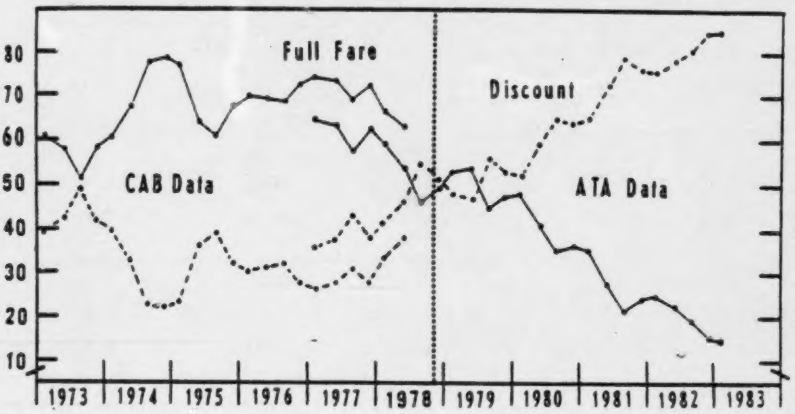
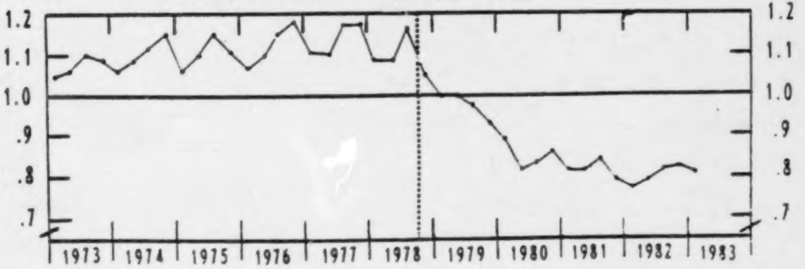


Chart B shows that because of discount fares (uneconomic pricing) the airlines have lost a lot of money and therefore their liabilities are greater than their assets.

16

B. Ratio of Current Assets to Current Liabilities, Total Certificated Industry 1973-1983, 12 Months Ended



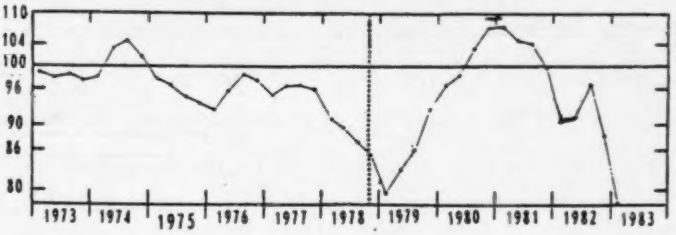
The hub and spoke system is another reason for the airlines losing money. This system was designed to keep passengers "in house:, to keep them from flying the competitor airline. It has caused the decline of fuel efficient, consumer convenient routing of flights. How has this cost the airlines more money? Example: a passenger travelling from New York (La Guardia) to San Fransisco on Republic Airlines will depart from New York, land in Memphis, land in Las Vegas, then finally arrive in San Fransisco. That passenger may have paid only $99.00 yet received full beverage and meal service on every leg. Fuel was burned and landing fees were paid. However, the airline did not charge the airfare to cover all the costs incurred.

CAB statistics show that passengers are flown well out of their way to keep them from flying the competitor airline. To fly a distance of 100 miles, an average of 106-112 miles is actually flown.[17] In other words, you will fly an extra 6-12 miles per 100 miles with the hub/spoke system.

It is interesting to note that the PATCO strike was the only period when the airline industry showed a profit since 1978.[18] This brief upswing was caused by the FAA's control over slots in each airport for safety purposes. Many airlines were able to get out of routes that were unprofitable and also provide more capacity in those that were profitable. During the PATCO strike, the airlines were regulated by the FAA instead of the CAB.

Chart C shows when the PATCO strike took place and that airlines actually made money during that time.

C. Index of Revenue/Passenger-mile (Yield), Domestic Operations of the Trunkline plus Local Service Carriers, 1972-1983 (1972 Quarter - 100) 19



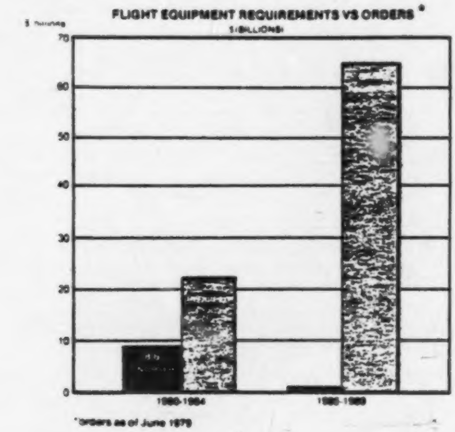
In addition to the airlines financial troubles, ATA literature informs us of the fact that $90 Billion must be spent on acquiring new or replacement aircraft during this decade. ATA assumes the useful life of aircraft is 18 years and since many of the jets were bought during the 1960's, it is now necessary to replace them. ATA also assumes that 225 million more passengers must be accomodated by 1990.[20]

However, Newsweek magazine reports that airlines are turning to used aircraft as an alternative. "While interests rates have eased and traffic is picking up a bit, airlines are still wary of committing their limited resources to new planes if they can possibly avoid it."[21]

The Committee interviewed two chief executives at Boeing Commercial Airplane Company in Seattle, Washington. We were told there that airplanes have an indefinite life span if they are maintained properly. But if fuel prices go up in the future, as is predicted, the airlines to survive will be those who are able to purchase new, fuel efficient airplanes such as the 757. To date, Boeing has received few orders for the 757's from U.S. commercial carriers.

Whether the airlines buy new airplanes or not, they still have a huge capital investment requirement during this decade. Chart D shows flight equipment requirements versus orders.

D. [22]



*Orders as of June 1979

So where do the airlines get all of this capital that they need so desperately? We all know that one of the sources has been employees who have provided concessions. ATA reports state that "To support such an enormous financial need, the airlines must maintain a record of consistently adequate profit levels. It is the only means for generating the necessary internal funds and attracting outside capital."[23]

In order to obtain favorable interest rates from the prime lenders, the corporate return on investment (ROI) must be between 13% and 15%.[24] Chart E shows that the only year the industry achieved a 13% ROI was in 1978, the year that airfares were highest and before deregulation! The ROI in 1982 was 2.7%[25] much below the necessary 13-15%.

U.S. SCHEDULED AIRLINES

RATE OF RETURN ON INVESTMENT:	'72	'73	'74	'75	'76	'77	'78	'79	'80	'81	'82
	4.9	5.1	6.4	2.5	8.0	10.9	13.0	7.0	5.8	5.3	2.7

According to CAB figures, the ROI on trunk carriers stockholders equity was -3.7% for 1981, and -15.1% for the year ending 6/30/82. "This statistic had been negative only three times during the 22 years prior to deregulation. By contrast, all manufacturing industries averaged 11.5% return on equity for the year ending 6/30/82, and have shown no negative rates in 27 years."[26]

In 1982, fuel prices went down, interest rates were beginning to go down, labor was stabilizing (a management term for employee concessions) and still the ROI was at its lowest level ever. Linda Puchala, President of AFA, has stated that "In 1982, the scheduled airlines suffered record losses of nearly $7 Billion. These remarkable losses occurred in spite of a drop in interest rates, a 4% increase in traffic, and a $770 million drop in fuel costs."[27] Obviously the problem is not costs but lack of revenue. Based on all of the information we have seen, employee concessions will not save the airlines from bankruptcy if price wars and uneconomic pricing of tickets continues.

To complicate matters further, Airline Executive magazine reports that the top 20 U.S. carriers will have interest payments in 1983 that will exceed $1.4 billion and that the same 20 carriers will have financing needs of about $13 billion over the next four years.[28] This amount is in excess of the $90 billion for aircraft!

To point out the impact of financial losses and debt on the industry, our economist friend at the CAB provided us with what is called a survivability forecast. By using different criteria he determines the top 18 airlines and rates them according to their ability to survive. (Please see attached forecast.) This forecast paints a realistic picture of the airline industry. Since this information was compiled, Trans World Airlines has spinned off 81% holding in TWA, Air Florida would have defaulted on its loans had it not been injected with a large amount of money from an outside source, and Pacific Express recently declared bankruptcy. As the saga of deregulation continues, we find that it has more negative effects on the nation than anticipated. First, air service to small communities has been reduced. Approximately 508 cities have had their service depleted or abandoned. A CAB survey found that between June 1978 and June 1981, non-hub airports have experienced a 34% decline in jet departures, and a 13% increase in small prop plane departures. Besides making it more difficult for the people who live in these communities to travel, deregulation has also made it difficult for these communities to grow, prosper and become self-sufficient. Mr. May stated that "small communities are not just losing air service, they are losing an economic lifeline that in many aspects is as important to their future as the interstate highway network."[29]

Secondly, we learned at the United States Post Office that the airline industry was originally regulated in 1938 to provide efficient mail to the public and prevent underhanded and criminal-like methods of contracting airlines to carry mail. When the industry was regulated, all commercial carriers were certificated to carry mail. With deregulation, new entrants are not required to carry mail, nor do they want any part of it. On January 1, 1984, the old practice of contracting airlines independently began once again.

Third, airlines are now making it difficult for passengers to interline conveniently the way they used to. Businessweek magazine reports "In addition to competing on price and service, carriers are now challenging industry-wide agreements that once guaranteed passengers an integrated national air transportation system. United Airlines, American Airlines, and Delta Airlines all recently bolted from a plan designed to protect the 65% of travelers flying on tickets issued by travel agents if an airline failed. United, American, and Delta are also trying to limit their "interlining" agreements with other airlines. These multilateral, open-ended agreements provide for checking baggage through to final destination when a change of planes is involved, and they enable passengers to use the same ticket on virtually any airline."[30]

To find solutions to the problems deregulation has created, we interviewed Dan May, President of Republic Airlines and Ed Altman, the former President of Republic Airlines, West. Using their advice, we have designed a proposal of recommendations to Congress:

1. "Cork the jug": Because of all the evidence indicating that deregulation is not working, the industry needs a moratorium on new entrants. This would allow the industry time to analyze the problems caused by deregulation and determine possible solutions.
2. Stricter rules to certificate new entrants: "Almost any fast-buck operator can get a certificate."[31] New entrants should be scrutinized for their financial resources and technical know-how. Less than 10% of new entrants survive. Yet, while they exist they weaken

established carriers. (Example: Pacific Express). Approximately four new entrants apply for certification monthly causing new damage to the system. The industry is like a dog that can't get rid of its fleas!

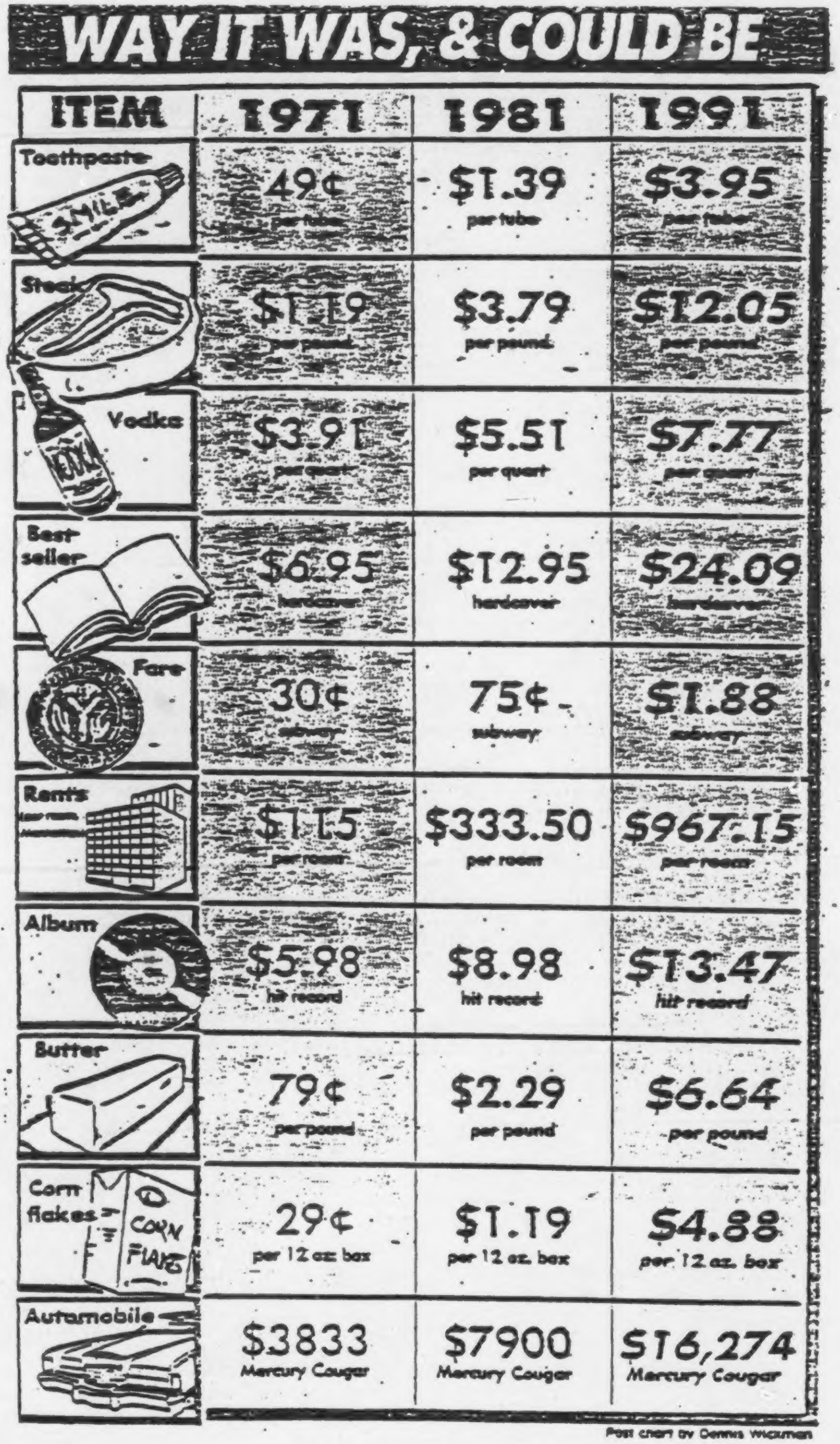
3. Fare floor and zone of reasonableness including mileage: Fares must be limited to a reasonable range above and below the industry fare level which would eliminate pricing extremes.

As an added note we believe that there is a conflict of interest with some of the proponents of deregulation. Alfred Kahn, former chairman of the CAB, is now on the Board of Directors of New York Air. Michael Levine who was also a top official at CAB, is now President and Chief Executive Officer of New York Air. Phil Bakes, former general counsel to Senator Ted Kennedy who also pushed for airline deregulation is now Vice President at Continental Airlines (which is currently operating under Chapter 11).

We suggest that Congress and the public were somewhat duped in the passage of the original Deregulation Bill. Airline deregulation has literally blown away a decade of airline productivity and improvement. In any case, the errors should be corrected now.

FOOTNOTES

1. ABC's Nightline with Ted Koppel
2. Airport Press, November 1983
3. Official Airline Guide
4. ATA, CAB
5. "Air Transport 1983, The Annual Report of the U.S." - ATA Scheduled Airline Industry
6. Official Airline Guide
7. Official Airline Guide
8. New York Times, June 4, 1983
9. Testimony by Daniel F. May before the House Aviation Subcommittee
10. Official Airline Book
11. ABC's Nightline with Ted Koppel
12. Wall Street Journal, December 28, 1983
13. Wall Street Journal, December 28, 1983
14. CAB, ATA
15. Report on airline deregulation by economist David Richards
16. Report on airline deregulation by economist David Richards
17. Report on airline deregulation by economist David Richards
18. Report on airline deregulation by economist David Richards
19. Report on airline deregulation by economist David Richards
20. "Airline Capital Requirements in the 1980's - ATA
21. Newsweek, December 5, 1983
22. "Airline Capital Requirements in the 1980's - ATA
23. "Airline Capital Requirements in the 1980's - ATA
24. "Air Transport 1983, The Annual Report of the U.S. Scheduled Airline Industry - ATA
25. "Air Transport 1983, The Annual Report of the U.S. Scheduled Airline Industry - ATA
26. Testimony by AFA President Linda Puchala before the Senate Aviation Subcommittee
27. Testimony by AFA President Linda Puchala before the Senate Aviation Subcommittee
28. Airline Executive, May 1983
29. Testimony by Daniel F. May before the House Aviation Subcommittee
30. Businessweek, November 28, 1983
31. Statement by Daniel F. May, Airport Press, November 1983



WAY IT WAS, & COULD BE

ITEM	1971	1981	1991
Toothpaste	49¢ per tube	$1.39 per tube	$3.95 per tube
Steak	$1.19 per pound	$3.79 per pound	$12.05 per pound
Vodka	$3.91 per quart	$5.51 per quart	$7.77 per quart
Best-seller	$6.95 hardcover	$12.95 hardcover	$24.09 hardcover
Fare	30¢ subway	75¢ subway	$1.88 subway
Rents	$115 per room	$333.50 per room	$967.15 per room
Album	$5.98 hit record	$8.98 hit record	$13.47 hit record
Butter	79¢ per pound	$2.29 per pound	$6.64 per pound
Corn flakes	29¢ per 12 oz. box	$1.19 per 12 oz. box	$4.88 per 12 oz. box
Automobile	$3833 Mercury Cougar	$7900 Mercury Cougar	$16,274 Mercury Cougar

Post chart by Dennis Wickman

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RECEIVED
1984 FEB 27 [illegible]
NORMAN Y. MINETA, M.C.

February 24, 1984

Honorable Nancy L. Kassebaum
United States Senate
Washington, D.C. 20510

Honorable Norman Y. Mineta
House of Representatives
Washington, D.C. 20515

RE: Sunset of the Civil Aeronautics Board and Transfer of Authority

Dear Senator Kassebaum and Rep. Mineta:

I have been practicing before the Civil Aeronautics Board and the Federal Aviation Administration for over fifteen years. I am concerned that the plan of the Department of Transportation to place §401 and §418 certification authority for domestic transportation (scheduled and charter) with the FAA would mark the end of deregulation. I urge Congress to enact legislation transferring to DOT authority to issue §401 and §418 domestic (interstate and overseas) certificates after satisfactory fitness findings. Later, the successful economic certificate holder would apply for appropriate FAA operating authority.

At the present time, a prospective new entrant into domestic transportation can satisfy the Civil Aeronautics Board's fitness requirements by showing a reasonable plan of financing, a reasonable management plan, and a clean record for compliance disposition (both from an FAA operating standpoint and a consumer fraud standpoint). The applicant need not have in hand the financing necessary to acquire aircraft, complete FAA Part 121 certification, and commence service. Some of those found fit by the CAB do start operations; many do not. But that is consistent with the philosophy behind deregulation.

The Board's centralized domestic carrier fitness process has been useful in determining which applicants are directly or indirectly controlled by foreigners in violation of the citizenship test of the Federal Aviation Act. The

Honorable Nancy L. Kassebaum
Honorable Norman Y. Mineta
February 24, 1984
Page 2 . . .

Board's procedures (which include service of applications on other carriers and civic parties) elicit information leading to the disclosure of adverse compliance disposition facts which the applicant does not disclose. That keeps the dishonest out of commercial aviation.

The process is centralized, and the staff is alert to disqualifying factors. Under DOT's plan, this would all be turned over to the FAA which lacks the expertise to determine economic fitness. If this fitness function is decentralized and handled locally by FAA inspectors who do not have training in these economic and consumer protection functions, then it is likely that the only new carriers to be certificated by the FAA for domestic service under §401 will be the very well financed (Frontier Horizon and new Braniff, for example) or the dishonest. This is not consistent with deregulation.

Notwithstanding statements made by the Department of Transportation, §401(a) and §418 of the Federal Aviation Act survive sunset for domestic transportation. However, no agency is the transferee of the Board's current authority to issue domestic scheduled, domestic charter carrier, and §418 certificates. Congress should cure that drafting omission by transferring this authority to DOT. A simple change to §1601(b)(1)(B) -- "with respect to interstate, overseas, and foreign air transportation ..." -- is all that is required. This change should be made to encourage and continue the philosophy and policy behind the 1978 Deregulation Act. And it will place charter and consumer protection regulation for all air transportation in one agency; the DOT proposal would divide it between the FTC and DOT.

Respectfully submitted,

Herbert A Rosenthal

Herbert A. Rosenthal

cc: Hon. Elizabeth H. Dole
Secretary of Transportation
Washington, D.C. 20590

HAR:prm
65A17-18

Statement of
HONORABLE JAMES H. SCHEUER

Mr. Chairman, thank you for the opportunity to present my views to the Committee today. I commend you for your leadership in holding these hearings regarding airline deregulation.

As we approach the Civil Aeronautics Board's termination, I am deeply concerned with one issue in particular -- the protection of nonsmoking airline passengers' health and safety. I firmly believe that the CAB's consumer protection authority should be transferred to another federal department or agency to ensure that consumer protection does not fall between the cracks in deregulation. When the CAB sunsets at the end of this year, its regulations governing smoking aboard commercial aircraft will disappear, leaving nonsmokers without any protection.

As you know, I have introduced legislation which would codify the current CAB smoking rules. The Board itself has reviewed these rules and has decided to maintain them. They require carriers to enforce four practices: provide a no-smoking section for each class of service; provide a seat in a no-smoking section to any passenger who wishes to sit there as long as he arrives within a specified length of time prior to the scheduled departure as determined by the airline; segregate cigar and pipe smokers; and prohibit tobacco smoking whenever a plane's ventilation system is not fully functioning.

In our drive to deregulate one industry after another, we must not overlook the health concerns of the flying public. Throughout the last two decades, our knowledge of the dangers present in cigarette smoking has expanded dramatically. We have launched campaigns to warn smokers of the hazards posed to their health. We have also enacted a variety of laws at the federal, state and local levels to protect nonsmokers from the discomfort and danger of breathing tobacco smoke. In light of this, it would be a foolish step backwards to allow the minimal regulation we have governing smoking aboard aircraft to fall by the wayside in deregulation.

Only recently are we learning about the potential harm tobacco smoke may have on the health of nonsmokers. Recent studies show that "passive smoking" -- breathing indoor air polluted by tobacco smoke -- may present serious health risks to nonsmokers. Last summer I held hearings before my Subcommittee on Natural Resources and Environment on the effects of indoor air pollution. Experts testified that passive smoking can adversely affect nonsmokers, particularly infants, children, the elderly, and those suffering from asthma, cardiovascular disease, respiratory disease and bronchitis.

In the Surgeon General's 1982 report, The Health Consequences of Smoking, Dr. Edward N. Brandt, Jr., U.S. Assistant Secretary of Health, states:

> Any health risk resulting from involuntary smoke exposure is a serious public health concern because of the large numbers of nonsmokers in the population who are potentially exposed. Therefore, for the purpose of preventive medicine, prudence dictates that nonsmokers avoid exposure to second-hand tobacco smoke to the extent possible.

This statement highlights the importance of focusing attention on the effects of passive smoking. We have already banned or segregated smoking in many public buildings, supermarkets, restaurants and stores. But we have failed to take similar steps with aircraft, where there is frequently less ventilation, where people are more confined, and where nonsmokers are usually exposed to sidestream smoke for a longer period of time.

We already know that passive smoking can cause coughing, wheezing, eye irritation, and aggravate symptoms in persons with asthma and other respiratory conditions. Experts continue to research these effects with the goal of eventually being able to quantify hazardous smoke levels. We know enough now about the adverse effects of sidestream smoke to act wisely and minimize those effects in any way we can.

The Board's present rules address these concerns in a manner that is fair and reasonable. They do *not* place an undue burden on smokers, but *do* constitute a major step in reducing the unreasonable burden imposed on nonsmokers in the absence of any regulation. The critical issue is not *which* agency receives the CAB's consumer protection authority, but that another department or agency *does* assume this responsibility. To ignore the health consequences of passive smoking aboard aircraft is to display clear disregard for the health of the nonsmoking population. I urge the Committee to transfer the CAB's consumer protection authority to protect the health and safety of the American public.

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